Supreme Court of the United States

October Term, 1920.
No. 555

THE TEXAS COMPANY,
Libelant-Petitioner,

against

HOGARTH SHIPPING COMPANY, LTD., owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

JOHN M. WOOLSEY,
Counsel.

SYNOPSIS OF POINTS.

FIRST POINT.

SECOND POINT.

THIRD POINT.

FOURTH POINT.

LAST POINT.

ALPHABETICAL LIST OF CASES CITED IN BRIEF FOR RESPONDENTS.

MISCELLANEOUS

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BRIEF FOR RESPONDENTS.

STATEMENT.

This case comes before this Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit. The decision in the District Court is reported in 265 Fed. 375, Record, 715-720.*

The Circuit Court of Appeals affirmed the District Court without opinion. 267 Fed. 1023. Record, page 253.

* Unless otherwise stated all references are to folios of the record.

The case comes on for argument out of its regular place because it was advanced by order of this Court made December 6, 1920, to be argued with *The Carlo Poma*, No. 167, and *The Pesaro*, No. 317.

A. *The Pleadings.*

The libel, filed September 22, 1915, asked damages in the sum of $50,000, for an alleged breach of a voyage charter party made at New York City on or about February 6, 1915, between The Texas Company, *hereinafter referred to as the libelant, or petitioner* and the Hogarth Shipping Company, Ltd., *hereinafter referred to as the respondent.* By that charter-party the libelant agreed to charter a steamship, which was to be declared on or before March 15, 1915, for a voyage from Port Arthur, Texas, to South African ports, with a cargo of petroleum in cases, steamer to load April 15 to May 15, 1915. *Libel*, 4-6. *Charter party*, 449-453, 456-457.

The charter-party contained the usual clause, providing to the charterer an option to cancel the charter-party if the vessel was not ready to load by two P.M. on May 15, 1915. *Charter*, Libelant's Exhibit 2, 456, 457.

The libel alleges that the steamship *Baron Ogilvy* was named by the respondents on or about March 11, 1915, for the performance of the charter party and claims that the respondent's subsequent failure and refusal to send the steamship or any steamship to Port Arthur for performance of the charter party entitles the libelant to the damages claimed. *Libel*, 7-9.

The charter was, therefore, a commercial contract for the use of the steamship Baron Ogilvy, or a voyage with

a cargo of petroleum in cases from Port Arthur to South Africa, which was to commence not later than May 15, 1915.

The answer of the Hogarth Shipping Company, Ltd., admits that the *Baron Ogilvy* was named for the performance of the charter party on or about March 11, 1915, and alleges that she was accepted by the charterer as the steamship by which the charter was to be performed. *Answer*, 18. It admits that the vessel did not perform the charter party and sets up as an excuse that on April 10, 1915, whilst the *Baron Ogilvy* was in London, she was requisitioned by the British Government for Government purposes and that thereby the charter party became impossible of performance, both in law and fact, and consequently the respondents were excused from performing it. *Answer*, 18-19, 29-32.

The answer also sets up that the provisions of a *special voyage charter clause*, putting the movements of the vessel under the orders of the British Government and providing for certain clauses to be included in all bills of lading, was a further defense to any claim for nonperformance of the charter. *Answer*, 22-31.

The charter party did not contain the usual "restraint of princes" exemption and the defense, therefore, comes to this—

First: That the charter was frustrated by the Governmental act of the British Government, because that act as effectively destroyed the subject matter of the charter party, namely, the steamship *Baron Ogilvy*, as if she had been stranded, sunk or burned without the owner's fault.

Second: That the special voyage charter clause was the equivalent in effect of the usual restraint of princes clause.

The answer of Hugh Hogarth and Sons, filed January 17, 1916, admits that Hugh Hogarth and Sons are a co-partnership, but denies that they were the owners of the steamship *Baron Ogilvy*. *Answer*, 50.

The same separate defenses are set up as in the answer of the Hogarth Shipping Company, Limited. *Answer*, 51-68.

Apparently all claim against the co-partnership has been waived. *Statement of Libelant's Counsel*, 88.

B. *The Facts.*

The facts in respect of which the concurrent findings of both the lower courts are in favor of the respondent are as follows:

The charter party was entered into at New York on February 6, 1915, and provided for the naming of a first class vessel, Class 100A1 at British Lloyds, on or before March 15, 1915. *Libel*, 6.

On or about March 11, 1915, the steamship *Baron Ogilvy* was named by Messrs. Hugh Hogarth and Sons to fulfil the charter party. *Hogarth*, 138.

In the last part of March the *Baron Ogilvy*, in performance of a prior voyage, arrived at London. Her owners sent the Master a copy of the charter party and instructed him, in case of inquiry by Government officials,

to state that the vessel was already committed under the charter party to The Texas Company. *Hogarth*, 142.

On April 10th, while the *Baron Ogilvy* was still in London, the owners received the following telegram:

> "Hogarth Glasgow,
> S. S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service. Transports." *Hogarth*, 159.

This telegram was sent by Mr. Ernest Julian Foley, Assistant Director (Military) to His Majesty's Director of Transports of the British Admiralty. *Foley*, 244.

Notice that the *Baron Ogilvy* had been requisitioned and would be unable to enter upon or perform the charter party, was immediately sent to the New York representatives of The Texas Company. *Record*, 101.

The vessel was at once taken over by the British Government, and remained continuously in the service of the Government until October 20, 1915, making several trips from New Orleans, Louisiana to Avonmouth, England, with mules. *Hogarth*, 162-3; *Foley*, 249; *Thompson*, 413-419. *Embassy Certificate*, 130.

C. *The Decisions Below.*

Judge Hough held:

That after the *Baron Ogilvy* had been named "the charter became an ordinary voyage charter for that vessel and none other," 703;

That there was in fact a requisition of the vessel by the British Government, 704;

That it was not necessary to have recourse to the Ambassador's certificate for the proof of this because on the evidence the requisition was independently proved, 704;

That the owner did not cause or contribute to the Government's taking the *Baron Ogilvy*, 705; and

That after the Government took her the "respondents were under no legal obligation to substitute another vessel for the *Ogilvy* any more than they were bound to make a new charter with the libelants. Legally the two propositions are identical," 706.

Judge Hough, therefore, found that the owner was excused from the performance of the charter party by a supervening impossibility of performance, which amounted in effect to the destruction of the subject matter, i.e., the *Baron Ogilvy*. Judge Hough stated that he preferred the phrase "impossibility of performance" to the phrase "frustration of venture" as a description of what had happened to discharge the parties from liability. 708-713.

In pursuance of this opinion, a decree was entered on February 21, 1919, dismissing the libel on the merits with costs. 715-720.

This decision was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit. 759-763.

The facts in the case have, therefore, been concurrently found in favor of the respondent, and for the purposes of the argument in this Court under its repeated decisions, the facts are:

That the requisition of the *Baron Ogilvy* is proved to have been a Governmental Act of the British Government;

That this proof is by ordinary evidence quite independent of the certificate of the Ambassador;

That the requisitioning was against the wishes of the respondent;

That the respondent did not make a voluntary freight agreement with the British Government which prevented the performance of the charter with the libelant, but, on the contrary,

That the steamship *Baron Ogilvy* was taken and used by the British Government under its requisition, so as wholly to prevent and render entirely impossible the performance of the charter party here in suit.

The libelants applied for and secured a writ of certiorari on October 25, 1920.

FIRST POINT.

ON THE REQUISITION OF THE STEAMSHIP BARON OGILVY THE CONTRACT OF CHARTER PARTY WAS FRUSTRATED AND ALL RIGHTS AND OBLIGATIONS OF THE PARTIES THEREUNDER WERE TERMINATED.

(1) *When the steamship Baron Ogilvy was named on March 11, 1915, to perform the charter party, the contract became one relating to that particular vessel alone, as if she had been originally named therein.*

All other terms of the contract were agreed upon. This is apparent from the charter party. *Libelant's Exhibit No. 2*, 448-474.

It was so found by Judge Hough in his opinion below. He said 703:

> "The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open."

Upon the naming of the *Baron Ogilvy* there was a meeting of minds on the only outstanding point of uncertainty.

The *Baron Ogilvy* was duly named on March 11, 1915, to perform the charter. *Hogarth*, fol. 138.

Far from disputing this fact, the libelant has made a sworn statement to that effect. *Libel*, fol. 7.

There is nothing in the pleadings or evidence to show that any objection was ever made by the libelant to the vessel. She must be deemed, therefore, to have been accepted by the libelant under the charter.

The rights and obligations of the parties after March 11, 1915, therefore, related only to the *Baron Ogilvy* and the charter party became one for the service of the steamship *Baron Ogilvy*.

The owner would not have had a right thereafter to substitute another vessel for her.

As Judge Hough said, 703:

> "* * * but the moment the ship-owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the

only ship that would perform that particular agreement."

This is plain business common sense as well as good law.

In Stoomvart Maatschappy Nederlandsche Lloyd v. *Lind*, 170 Fed. 918 (1909), a coal charter party gave charterer the option of three loading ports. He exercised the option by naming one, but finding no cargo there, sought to have the vessel sent to another loading port. To accomplish this purpose he made several offers to the owner, but they were not accepted. The vessel remained in the original port, where she eventually loaded.

In an action for demurrage by the owners, this Court reversed the decision below and granted the demurrage claimed for the entire period of the detention, on the ground that upon the naming of the port of loading the charter became *an agreement to carry coal from that port only* and, consequently, that there was not any obligation on the owners to go to any other port to load. In the course of the opinion Judge Ward said at page 919ff. (Italics ours):

> "* * * Accordingly, August 9th, the charterer, after communicating with Washington, ordered the steamer to go to Baltimore for her cargo. This they had no right to do, because the charter had become, *by virtue of their ordering her to Newport News, an agreement to carry from Newport News to Honolulu.* * * * It is, however, equally true that one party cannot compel the other affirmatively to do something which the contract does not require of him. Men generally being reasonable, such departures from agree-

> ments are usually accomplished amicably. Whether the ship owner in this case was reasonable or not in its refusal to shift to Norfolk, except upon its own terms, it had a right to refuse, because there was nothing in the charter compelling it to shift."

It is submitted that there is not any distinction in this respect between an option to name a loading port and an option to name a vessel and that, therefore, the case just cited is a precise authority for Judge Hough's decision on this branch of the instant case, and that his decision was right on this question.

(2) *The fact of the requisition is established conclusively by the avowal thereof by the British Embassy.*

(a) *The Embassy certificate and the appearance of its counsel as amici curiae.*

The British Embassy has certified under its official seal, as follows, 130, 131:

> "IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a cor-

poration created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland."

The British Embassy's counsel appeared as *amici curiae*, offered, and with leave of the court filed, a Suggestion which embodies the certificate, and further submits that neither the fact of the requisition, nor its effects should be inquired into by this court, and that the court should decline to adjudicate the cause, upon the grounds that it involves the relations between the British Government and the owner of a British steamship, calls for a determination by a United States Court of the effect of Government acts of the British Government, and involves an attempt to hold the respondent liable for acts of its Government. 124-129.

(b) *The appearance of counsel to the British Embassy as amici curiae was in accordance with approved practice, both here and in England, and it was in all respects proper for the Court below to allow it.*

Each Court has an inherent right in the exercise of its judcial discretion to allow appearances before it of amici curiae.

To have refused the request of the Ambassador of a friendly foreign nation would have been a grave breach of judicial discretion.

The inherent right and power of a Court to permit intervention by an *amicus curiae* and to decide to what extent it will hear him and give him credence has been established by long usage.

This right is a part of a Court's essential nature as a tribunal which seeks from whatever source procurable the information necessary to assist it in administering the law.

This right has perhaps been nowhere more pointedly expounded than by Judge Hough *arguendo* during the trial of the present case, 96-99.

The libelant's counsel objected to the intervention contending that the intervention should have been through the State Department and the Department of Justice. The following colloquy took place, 96-99:

> "The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?
>
> Mr. Poor: Well, it seems to us that it seriously——
>
> The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.
>
> Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government official it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to di-

rectly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is——

The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a Court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him."

In the case of *Northern Securities Co.* v. *United States*, 191 U. S. 555 (1903), a motion for leave to file a brief as *amici curiae* was denied to counsel not connected with the case for reasons in no way apt here, but the Chief Justice said, at pages 555, 556:

"Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green* v. *Biddle*, 8

Wheat. 1, 17; *Florida* v. *Georgia*, 17 How. 478, 491; *The Gray Jacket*, 5 Wall. 370."

In *The Employers Liability Cases*, 207 U. S. 463, at 490, the Court, after refusing a direct intervention by the Department of Justice, permitted the United States to appear and be heard as *amici curiae*.

This Court has permitted intervention by counsel to the British Embassy as *amici curiae* in the following recent cases:

Dillon v. *Strathearn Steamship Co.*, 248 U. S. 182.

Strathearn Steamship Co. v. *Dillon*, 251 U. S. 348.

Ex Parte Muir (*The Gleneden*) No. 28, Oct. Term, 1918, argued January 7, 1919, still awaiting decision.

In the Circuit Courts of Appeal similar intervention as *amici curiae* by counsel representing Ambassadors, have been filed in the following cases:

Second Circuit—

The Claveresk, 264 Fed. Rep. 276.

The Carlo Poma, 259 Fed. Rep. 369.

Muir v. *Chatfield*, 255 Fed. Rep. 24.

Third Circuit—

The Adriatic, 258 Fed. Rep. 902.

Fifth Circuit—

The Strathearn, 256 Fed. Rep. 631.

Similar interventions have been allowed in several of the District Courts—

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.).
The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.).
The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.).
The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.).
The Roseric, 254 Fed. Rep. 154 (D. of N. J.).
The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.).
The Santa Cruz, (not reported, E. D. Va., June 28, 1919).
The Carlo Poma, (No. 167—To be argued with this case,—not reported).
The Pesaro, (No. 317—to be argued with this case—not reported).

New York State Courts have also allowed similar intervention:

Nankivel v. *Omsk All Russian Government*, New York Law Journal, Oct. 28, 1920.
Marine Transport Service Co. v. *Romanoff*, New York Law Journal, February 1, 1918.

The English Admiralty Court in the case of the frigate *Constitution* allowed an even more informal intervention on behalf of the American Ambassador to Great Britain than was made here in behalf of the Italian Embassy.

The Constitution, L. R. 4 P. D. 39.

So in *The Crimdon*, 35 Times Law Reports 81, intervention was allowed in the British Admiralty Court on

filing of letters from a United States Shipping Board representative in England stating that the United States Shipping Board Emergency Fleet Corporation was a governmental agency, that it had the *Crimdon*, a Swedish vessel, under charter, and that she had been assigned to the United States Army Transport Service.

In the case of *The Roscric*, 254 Fed. 154, where a suggestion was filed by counsel for the British Embassy claiming immunity, Judge Rellstab of the District Court of New Jersey, in dealing with the question of such a suggestion, said 254 Fed. at page 163:

> "As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another osvereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as *amicus curiae*—for a foreign government—Judge Thompson said he 'was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.'
>
> "In the *Florence H, supra*, Judge Learned Hand declined to receive the suggestion made on

behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

"There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H*, I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roscric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified."

In the case of *The Maipo*, 252 Fed. 627, Judge Mayer said, at page 628, in dealing with the suggestion and certificate by the Chilean Chargé d'Affaires:

> "While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the court, as here, by the duly accredited official of the foreign government.
>
> "In response to an inquiry from proctors from the libelant and also for another shipper or consignee, our Department of State through the Third Assistant Secretary, has replied 'that the department has no intention of interfering with the legal proceedings to which you refer.' I cannot assume that this communication is intended to have any significance. It means, as I read it, nothing more than that the question is one for the courts to dispose of in due course. Doubtless the Chilean government has not deemed it necessary to bring the matter to the attention of the Department of State, but is willing, without further ado, that the points involved shall be passed upon by the court in orderly procedure without suggestion from our own government."

It would seem on principle apparently recognized by these authorities that a Court is at liberty in the exercise of judicial discretion to choose its own friends and to give to the information which they may communicate

to it such weight as the Court considers the communications are entitled to receive.

Inasmuch as the purpose of the intervention is always stated to the Court when the intervention as *amicus curiae* is sought, the Court in the exercise of its *judicial* discretion if it feels that the intervention is not advisable, can on the threshold refuse to admit the intervention. Thus any embarrassment, which might thereafter occur, if the Court did not wish to give recognition to the statement which the friend of the Court purposes making, can be avoided.

The underlying error in the appellant's brief in dealing with the question of Ambassadorial intervention seems to be,

That it fails to recognize the inherent right and power in a Court to allow such intervention;

That it fails to realize the Court's *duty* in the exercise of its *judicial* discretion to admit Ambassadors of friendly Foreign Governments as *amici curae,* and

That it fails to realize that the necessary control which a Court has over the situation in a case will enable a Court to protect itself by refusing intervention whenever it thinks, in the exercise of a proper judicial discretion, wise to do so.

There has been recent instances where intervention by Ambassadors as *amici curae* has been sought and wrongly denied.

In the case of *The Isle of Mull,* reported in 257 Fed. 798, Judge Rose, in the District Court of Maryland, re-

fused to allow an intervention sought by the British Embassy similar to that allowed by Judge Hough below.

In the *Isle of Mull* immunity was not claimed. The suggestion merely was that the requisition was a governmental act. Judge Rose stated that before permitting intervention in such cases he would await an authoritative decision by a higher Court.

In the case of *The Appalachee*, 266 Fed. 923, Judge Smith, in the District Court for the Eastern District of South Carolina, for reasons substantially the same as Judge Rose gave, wrongly refused to allow an intervention by the British Embassy claiming immunity.

The fact that these interventions were attempted does not appear in either of the opinions, but counsel for the appellants in this case represented the ship in both those cases and has full knowledge of the situation. The fact of the refusal of the intervention in those two cases is confirmed by the statements in the brief of counsel for the British Embassy filed by leave of this Court in the present case.

It is submitted that these refusals to permit ambassadorial intervention were erroneous. They involved an improper exercise of discretion, and constituted appealable error.

The Ambassador may instruct consular officers to intervene in various classes of litigation.

The intervention of consular officers in cases of suits by seamen before the present Seamen's Act came into force was a commonplace of procedure in such cases, and often led the Courts to refuse jurisdiction.

The Ester, 190 Fed. 216 and cases there cited.

Unreported cases where consular protests have been sustained in counsel's own experience are *Kicklakis* v. *The Hermia* in the Southern District of New York, and *Norsman* v. *The Overland* in the District of New Jersey.

Cf. *The Belgenland*, 114 U. S. 355, 364, 365.
Rocca v. *Thompson*, 223 U. S. 317.

In any event, it is not for private litigants to make objection to an ambassadorial intervention, whatever its form may be, or to assign error, intervention being allowed. Objection can only properly be made by the Court itself or by our own Executive on proper diplomatic representation to the Ambassador who seeks to make the intervention or through him to his Government.

It is clear, therefore, that on principle and by well established precedent in our Courts, the District Court was right in allowing the intervention and suggestion of the British Ambassador in the present case.

Indeed, it is difficult to see how a foreign governmental fact or act of any kind could be established except by the statement in our Courts of the duly accredited representative of the Government in question.

It would be a strange and mediæval doctrine to hold that the accredited Ambassador of a friendly foreign nation should be denied access to our Courts to protect his country's interests and nationals unless he first secured permission from our State Department!

Foreign Ambassadors are not Ambassadors to the State Department but to the United States. The State Department accepts their credentials and then they are

free to act in any matters according to diplomatic usage.

It is true that most communications which they may wish to make are of a diplomatic nature and hence made to the Executive through the State Department.

But as Judge Hough points out our Judiciary is an independent and equally historical branch of our government.

Why, therefore, should not an Ambassador communicate to our Courts regarding matters which, in his opinion, involve his sovereign's rights or interests, or the interests or rights of his country's nationals, whether it be as to vessels or other property, provided always that his communications take such form as may be satisfactory to our Courts?

The appellants contend that the suggestion should have come through the State Department.

The only cases so far as counsel is aware in which the State Department has transmitted, through the Department of Justice, to the attention of a Federal Court during the recent war any information received from an Embassy was in the cases of *The Luigi*, 230 Fed. 493 and *The Attualita*, 238 Fed. 909. A certified copy of the record in *The Attualita* in the Circuit Court of Appeals for the Fourth Circuit is herewith submitted.

The suggestion, which was the same in form as in *The Luigi*, was there filed by the United States Attorney for the Eastern District of Virginia, as will be seen by an examination of the record of that case at page 8, did not certify to the truth of the statement of the Italian Embassy and did not even make a prayer for immunity, but merely submitted the fact that the vessel was requisi-

tioned by and in the service of the Italian Government for such consideration as the Court might deem necessary and proper.*

It is difficult to see how such a procedure differs in any *essential* way from the procedure followed here, where counsel in good standing before the Court comes into court, and asks leave to file a suggestion of the duly accredited Ambassador from the Kingdom of Great Britain and Ireland.

The procedure in *The Attualita* and *The Luigi* was merely a roundabout way of doing something which was as conventionally and properly done in a direct way in this case.

The Italian Embassy had to appear by counsel as *amici curiae* in both *The Attualita* and *The Luigi*.

The question after all is merely one of the authenticity of the representation made to the Court. That is as satisfactorily established by appearance of counsel in good

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* The suggestion in the *Attualita* was as follows:

I, Richard H. Mann, United States Attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States a communication dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian Steamship *Attualita* which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian Government; and was at the time of said attachment and is now in the service of the Italian Government; and I am further directed to call the attention of this Court in this connection to *The Luigi*, 230 Federal Reporter 493.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian Government, but I present the suggestion as *amicus curiae*, as a matter of comity between the United States Government and the Italian Government, for such consideration as the Court may deem necessary and proper.

RICHARD H. MANN,
United States Attorney.

By HIRAM E. SMITH,
Ass't United States Attorney.

standing as in any other way, for counsel are officers of the court.

(c) *The validity of the requisition is conclusively established by the certificate and avowal of the Embassy.*

The act of requisitioning of the *Baron Ogilvy* occurred within British territory.

> "The acts done under the authority of one sov-
> "ereign can never be subject to the revision of the
> "tribunals of another sovereign."
> Per Story, J., in *The Invincible*, 2 Gall. 29.

This rule has been repeatedly and very recently re affirmed.

See

Underhill v. *Fernandez*, 168 U. S. 250;
American Banana Co. v. *United Fruit Co.*, 213 U. S. 347;
Oetjen v. *Central Leather Co.*, 246 U. S. 297;
Ricaud v. *American Metal Co.*, 246 U. S. 304;
Hewitt v. *Speyer*, 250 Fed. 367;
The Santissima Trinidad, 7 Wheat. 283;
The Athanasios, 228 Fed. 558;
The Florence H., 248 Fed. 1012, 1017;
The Adriatic, 253 Fed. 489, 258 Fed. 902.

English cases laying down the same principle are:

Capel v. *Soulidi* (1916), 2 K. B. 365;
The Zamora (1916), 2 App. Cas. 77, 92;
The Parlement Belge, L. R. 5, P. D. 197.
The Duke of Brunswick v. *The King of Hanover*, 2 H. L. Cas. 1;

Secretary of State v. *Kamachee*, 13 Moore P. C. 22;
Burn v. *Denman*, 2 Exch. 167;
Dose v. *Secretary of State*, L. R. 19 Eq. 509.

The validity and Governmental nature of the requisition of the *Baron Ogilvy* established by the Embassy certificate cannot be challenged in our Courts.

The reason for this rule, which is thoroughly established, is that to submit to a judicial investigation of the facts stated in the suggestion would be to submit to the jurisdiction of the Court and it is well settled that a foreign sovereign or Government can not be made subject *in invitum* to the jurisdiction of our Courts.

In the case of *The Parlement Belge*, L. R. 5, P. D. 197, in which the English Court of Appeal held that an unarmed packet belonging to the King of the Belgians was immune from process in spite of the fact that the vessel carried merchandise for freight and passengers for hire, Lord Justice Brett said in dealing with the conclusiveness of the representations, at page 219 (Italics ours):

> * * * the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. *To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into.* That was expressly decided under very trying circumstances

in the case of *The Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule."

In Hall on International Law (4th Ed.) Sec. 44, page 167, it is said (Italics ours):

"Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law. [Ortolan, Dip. de la Mer, i. 181-6; Calvo, §876-84.] The character of a vessel professing to be public is usually evidenced by the flag and pennant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by competent authority within the state itself. [The Santissima Trinidad, vii Wheaton, 335-7; Ortolan, Dip. de la Mer, i. 181; Phillimore, i § ccexlviii.] *A fortiori attestation made by the government itself is a bar to all further enquiry.*"

In a footnote to this section, in dealing with the word of honor of a Commander, the author says:

> "The admission of the word of the commander is sometimes regarded as obligatory. When the *Sumter* was allowed to enter the port of Curacao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that 'le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par ecrit.' Ortolan, Dip. de la Mer, i. 183."

In a footnote dealing with an attestation made by a government, and citing *The Parlement Belge*, the author says:

> "This (i.e. attestation by a government) is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term."

This section from Hall was quoted with approval by Mr. Justice Brown in the case of *Tucker* v. *Alexandroff*, 183 U. S. 424, at page 441.

The conclusiveness of such suggestions has been recognized and the rule laid down has been approved in many leading cases in this country. Examples are:

The Exchange, 7 Cranch. 116.
The Maipo, 252 Fed. 627.
The Adriatic, 253 Fed. 489.
The Roseric, 254 Fed. 154.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363; affirming 253 Fed. 152.

The Adriatic, 258 Fed. 902.

The Carlo Poma, 259 Fed. 319.

The Claveresk, 264 Fed. 276, 280.

Texas Company v. *Hogarth*, 267 Fed. 1023, affirming 265 Fed. 375.

To the same effect also many English cases:

The Constitution, L. R. 4, P. D. 39.

The Crimdon, 35 T. L. R. 81.

In the Goods of Anne Dumoy, 3 Hagg. Eccl. 767.

In the Goods of Klingemann, 3 Swab. & T. R. 18.

In the Goods of Prince Oldenberg, L. R. 9 P. D. 235.

At page 34 of the appellants' brief they make the statement that in the case of *The Attualita*, 238 Fed. 909, evidence was taken in respect of the relation of the Italian Government to the *Attualita*, in spite of the fact that a suggestion had been filed by the United States Attorney.

Counsel for the appellee in the present case was counsel for the libelant in the *Attualita* case and has knowledge of all the proceedings had therein.

The explanation of the fact that testimony was taken was that counsel for the libelant, while he admitted that he could not challenge the truth of the statements contained in the suggestion, demurred to them on the ground that inasmuch as they did not state either ownership or possession in the Italian Government, they did not state

sufficient reasons for claiming that the *Attualita* was a public ship or immune for any other reason.

In the case of *The Santissima Trinidad,* 7 Wheaton 283, Mr. Justice Story, held conclusive the proof of ownership of a vessel by a foreign sovereign, where the Commission of her captain was introduced in evidence. He said at pp. 335-336—

> "It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general, the commission of a public ship, signed by the *proper authorities of the nation to which she belongs, is [*336] complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without en-

dangering the peace and repose, as well of neutral as of belligerent sovereigns."

To the same effect is *The Exchange*, 7 Cranch. 116, where Chief Justice Marshall said, at page 147:

"The principles which have been stated, will now be applied to the case at bar.

"In the present state of the evidence and proceedings, *The Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a *right to assert his title in [*147] those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, *The Exchange* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that, while necessarily within it, and demeaning herself

> in a friendly manner, she should be exempt from the jurisdiction of the country.
>
> If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

There are a great many facts which cannot properly be called political facts, and at the same time are not justiciable facts.

The facts to which we refer may properly be called diplomatic facts or governmental facts or foreign administrative facts.

There is no jurisdiction over foreign sovereigns in our Courts under our Constitution.

This Court has under Article 3, Section 2, of the Constitution, original jurisdiction "in all cases affecting Ambassadors, other public ministers and consuls" only.

The result is that there are a large number of facts concerning foreign nations that are not justiciable in our Courts because there is no jurisdiction given over them by the Constitution. Of course a foreign sovereign can waive immunity and consent to suit but he cannot be made subject to the process of our courts.

It has been held that the decision of questions of a political nature is exclusively for the Executive and Congress.

The Divina Pastora, 4 Wheat. 52.

The decision of the Executive branch of the Government in respect of such matters is conclusive on the Judicial Department.

Williams v. *Suffolk Ins. Co.,* 13 Pet. 415.

Examples of Political Questions are:

Recognition of States or Nations,

Jones v. *U. S.*, 137 U. S. 202.
U. S. v. *Lynde*, 11 Wall. 632.
Kennett v. *Chambers*, 14 How. 38.
Gelston v. *Hoyt*, 3 Wheat. 246.
Rose v. *Himely*, 4 Cranch. 241.
The Nueva Anna, 6 Wheat. 52.
U. S. v. *Palmer*, 3 Wheat. 610.

Accession and conquest of territory.

Hornsby v. *U. S.*, 10 Wall. 224.

Military occupation of subjugated territory.

Neely v. *Henkel*, 180 U. S. 109.

Foreign relations and policy.

The Nereide, 9 Cranch. 388.

Claims *v.* foreign government.

Comegys v. *Vasse*, 1 Pet. 193.

Policing of international waters.

Re Cooper, 143 U. S. 472.

Adjustment of political boundaries.

Foster v. *Neilson*, 2 Pet. 253.
Garcia v. *Lee*, 12 Pet. 511.
U. S. v. *Arredondo*, 6 Pet. 691.

Relations with the Indian tribes.

Cherokee Nation v. *Georgia*, 5 Pet. 1.
U. S. v. *Holliday*, 3 Wall. 407.

Cession of territory by state to nation.

Burton v. *Williams*, 3 Wheat. 529.

Adoption and validity of constitutions.

Luther v. *Borden*, 7 How. 1.

Political and civil rights of persons.

Georgia v. *Stanton*, 6 Wall. 50.

Examples of non-justiciable governmental facts are:

The title of foreign government owned vessels, as involved in *The Pesaro* and *The Carlo Poma*.

That a certain act was a governmental act of a foreign Government.

The Adriatic, 253 Fed. 489, aff'd 258 Fed. 902.
The Claveresk, 264 Fed. 276, 280.
Texas Co. v. *Hogarth*, 265 Fed. 375, aff'd 267 Fed. 1023—the instant case.

Proof as to the status of a governmental commission.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363, 368.

Doubtless other instances could be added but the above will suffice to indicate the nature of non-justiciable governmental facts.

The fact to which the Ambassador certified in his suggestion was the Governmental nature of an Act of the British Government within its own territory, and since he has so certified the question is not justiciable in our Courts because it is a fact not concerning an Ambassador but a fact concerning a foreign sovereign and a foreign sovereign does not have to submit himself to the jurisdiction.

The case of *South Carolina* v. *Wesley*, 155 U. S. 542, cited below by appellant, is not an authority to the contrary for the *question involved in the suggestion in that case was justiciable in our courts.* The present question is not so justiciable.

In the case of *The Adriatic*, the requisition of a British steamship by the British Admiralty was made effective at Philadelphia and she was sued for failure to enter on the performance of a voyage charter party. The British Ambassador appeared by counsel as *amicus curiae* both in the Court below and in the Circuit Court of Appeals. In the latter Court he filed a certificate avowing the Governmental nature of the act of the British Government.

Judge Haight said, 258 Fed. at page 903 (Italics ours):

> "On principles of international comity, we feel bound to accept the suggestion and avowal of the British Ambassador as conclusively establishing both the fact of the requisition and its governmental character.
>
> * * * * * *
>
> "* * * it is apparent that if the vessel was legally requisitioned, no liability attached to the

respondents by reason of the failure of the vessel to thereafter perform the charter, because, upon such a requisition, the charter party, by its express terms, became null and void. But, *in accordance with the rule that 'the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory,' it is not within the province of a court of this country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain; it must be accepted as legal;* or as it is sometimes expressed, such a question is not justiciable. *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 309; *Underhill* v. *Hernandez*, 163 U. S. 250, 253; *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, 357; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303; *The Invincible*, 2 Gall. 29, 13 Fed. Cases No. 7054; *Hewitt* v. *Speyer*, 250 Fed. 367 (C. C. A. 2d Cir.); *Earn Line S. S. Co.* v. *Sutherland S. S. Co.*, 254 Fed. 126 (D. C. S. D. N. Y.) Hence it follows that even if the charter party be construed as libelants must have it construed to raise the question of the validity of the requisition, *no cause of action accrued to them from the failure of the vessel to perform the charter, so far as the courts of this country are at liberty to determine.*"

In the case of *Earn Line Steamship Company* v. *Sutherland Steamship Company Ltd.*, 264 Fed. 276, and as yet unreported, Judge Hough said of the intervention of the British Embassy and the avowal of a requisition as a governmental act:

"What effect the Court gives to the information so received is a different matter. The friend's

statements, if of evidential value, must, like other evidence, be weighed and tested by legal rule.

"In this instance the substance of the suggestion offered was that the British Embassy avowed as a governmental act on the part of the United Kingdom the requisitioning of the *Claveresk* on or about February 10, 1917, and its continuous retention in government service substantially down to the day of trial.

"The question whether the trial Judge should or should not have received and considered this suggestion is not reviewable; but it may be and has been assigned for error that the court below held the suggestion conclusive evidence of two essential facts, viz: (1) the compulsory nature of the *Claveresk's* service, and (2) the identification of government as the compelling force. While this Court feels no inclination to depart from the rulings of *The Carlo Poma*, 259 F. R. 396, and *Agency, etc., Co.* v. *American, etc., Co.*, 258 F. R. at 368, holding that a certificate such as this, describing a certain act and avowing it as governmental is to be taken as verity, we do not find it necessary to rest decision on this ground. The evidence in the ordinary sense of that word, *i. e.*, the competent and material testimony of persons duly sworn and papers produced is sufficient for our purposes;—indeed we think this was the course pursued below."

The situation is the same in this case.

The requisition of the *Baron Ogilvy* is established not only by the Embassy avowal, but also by the evidence taken under open commission in England.

(3) *The evidence as to the requisition.*

The Courts below have concurrently found in the respondent's favor on the fact of the requisition as shown by ordinary evidence.

Both Courts below have found on such evidence that the requisition was a governmental act.

Ernest Julian Foley was Assistant Director (Military) to His Majesty's Director of Transports at the time of the requisition of the *Baron Ogilvy*. *Foley*, 235.

The Director of Transports was the head of the department of the British Admiralty, which dealt with all matters of sea transport and requisition under the direction of the Lords Commissioners of the Admiralty, a branch of the executive government exercising the powers of the Crown in respect of naval matters. *Foley*, 235-237.

In accordance with the general practice, Mr. Foley sent a telegram dated April 10, 1915, and reading as follows, 244:

> "8/48 O H M S Admiralty, London.
> Hogarth, Glasgow. SS *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service.
>
> TRANSPORTS."

In requisitioning vessels Mr. Foley was acting in behalf of the Lords Commissioners of the Admiralty. *Foley*, 259-260.

The requisition of the *Baron Ogilvy* was made pursuant to a request from the Military Department, for vessels to transport mules, *Foley*, 253-254, and the vessel

was used for this purpose. *Foley*, 249; *Thompson*, 41
419.

If the requisition had not been complied with th
vessel would have been taken by force. *Foley*, 245-24
272.

Mr. Hogarth, the senior member of the firm of Hug
Hogarth and Sons, *Hogarth*, 135, testified that on Apr
10, 1915, he received a telegram from the Admiralt
requisitioning the *Baron Ogilvy*. *Hogarth*, 158-159.

He had had previous experience of the course pu
sued by the Government in requisitioning vessels, *H*
garth, 160, for six of the twelve vessels of the Hogar
Steamship Company, Limited, of which his firm was ma
ager, had been requisitioned. *Hogarth*, 140. The requ
sition of the *Baron Ogilvy* was the usual form. *Hogart*
160.

The telegram was considered as a formal requisiti
of the steamer, *Hogarth*, 173, and was confirmed in t
subsequent dealings of the parties in respect of the a
rangement for the carriage of mules. *Hogarth*, 173.

That it was not confirmed immediately by a letter
requisition was an error in office routine, due to pressu
of work of the Admiralty. The failure to send the lett
however, would not have prevented seizure of the sh
for non-compliance with the order contained in the te
gram. *Foley*, 245-246, 274.

The failure to send a formal letter of requisition
not, in the opinion of Charles Robertson Dunlop, w
qualified as an expert in respect of the prerogatives a
powers of the English Crown, 578-579, affect the valid
of the requisition under English law. 221, 294-295, 2
299, 300-301, 309-314.

In the case of the *Earn Line Steamship Co.* v. *Sutherland Steamship Co., Ltd.*, the Court, speaking by Judge Hough, dealt with similar facts, as follows:

> "The second proposition (that the order was *ultra vires*,—meaning that it was not in accord with English municipal or constitutional law) is equally without support, even though we disregard the multiplied decisions, including our own, regarding the efficacy of the ambassadorial certificate. It is here proven without any reference to that document, that the act commonly called 'requisition' was governmental, and contained or expressed in a letter or order over the signature of the Secretary of the Admiralty. Further, that such letter or order was in assumed compliance with a proclamation dated 3d August, 1914, and an Order in Council dated 10th November, 1915. Whether in exercising this power the officers sending the telegram, signing letters and issuing orders were acting in strict accord with the municipal and constitutional law of the United Kingdom, is a question with which we cannot be concerned; for there is plainly proven a governmental act done within British territory, and we entirely agree with the court below that it is settled law that the act of another sovereign within its own territory is for our purposes legal of necessity. (*Hewitt* v. *Speyer*, 250 F. R. at 370, and cases cited.) The requisition of the *Claveresk* was a restraint of princes, lawful so far as we are concerned to inquire; * * *."

So here the requisition is proved as a governmental act by evidence given in England quite independently of the Embassy certificate.

(4.) *No act of the owner or its representatives and no failure to act on their part in any way caused or contributed to the requisition.*

Both Courts below have concurrently found in the respondent's favor on this point, but as it is sought to be argued by the petitioner in its brief it will be dealt with again here.

There is not any evidence that the owner preferred to have its vessel requisitioned rather than to carry out the charter party. On the contrary the evidence clearly shows that the owner desired to perform and was prevented from performing solely by the requisition which rendered performance impossible.

The Hogarth Shipping Company was endeavoring to keep its unrequisitioned ships away from England, in order, if possible, to avoid further requisitions. *Hogarth*, 180.

The *Baron Ogilvy*, however, was compelled to come to London, in order to discharge cargo. *Thompson*, 400, 401, 432.

There was nothing left undone that could have been done to keep the vessel off requisition. *Hogarth*, 165. It simply could not be avoided for the Government wanted prompt ships. *Foley*, 243, 246-249.

The appellant argues, in effect, that the mule rates under the requisition were so attractive that the appellee made a voluntary arrangement with the British Government to carry mules in total disregard of its contract obligations to the appellant.

This is not the fact.

It is the fact that no arrangement for carriage of mules was made with the government until *after* the requisition had occurred.

It was obviously to the owner's interest to perform the charter with appellant and then to proceed from South Africa to Pagoumene, New Caledonia, for a cargo of ore homeward on his private account. 496.

Mr. Hogarth states that he wished to carry out the charter with the Texas Company rather than to have the vessel requisitioned, for the profit under the charter would have been much greater than the profit under requisition.

In regard to this he testified on direct examination, as follows, 165:

> "Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition."

The loss is shown more in detail on re-direct examination (Italics ours). 211:

> "Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month? A. *A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.*
>
> "Q. *As compared with £1,500 to £2,000?* A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, *she would have left about £7,000 profit on the oil voyage.*

"Q. And in three months of Admiralty requisition on the terms on which you were what was the profit? A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.

"Q. *Did you make a considerable loss by having the vessel requisitioned?* A. *A very great loss.*

"Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No."

The fact that the owners would have had to cover war risks under the charter, whereas the Government bore the war risk under the requisition, was allowed for in the testimony above quoted. *Hogarth*, 213-214.

The libelant in his brief has attempted to refute this evidence by Mr. Hogarth that the carriage of mules under the requisition represented a loss to him as compared with what would have been earned by the carriage of oil under the charter which is the subject matter of this suit.

The difficulty with the appellant's position in this regard is that it is attempting to attack direct evidence by figuring on estimates of its own.

There is not anywhere in the evidence any statement as to the expense for putting in the mule fittings, for

attendance on the mules, fodder, electric-light, wireless telegraphy installation, etc. In other words, the libelant has attempted to create a comparison in which there are a number of unknown elements on both sides. For example, it is not known to how many ports the steamship *Baron Ogilvy* would have been ordered by the Texas Company in the event that she had carried the case oil.

It was provided in the charter that the *Baron Ogilvy* was to have half a cent extra per case on the whole cargo for each additional port and an option was given to discharge it at from one to five ports.

It is not known how many mules died on the voyages of the *Baron Ogilvy* thus causing loss of the gratuity given for mules landed alive.

There is not any definite proof as to what the expenses under the Texas Company charter would have been, nor what the expenses under the Government requisition were.

If, therefore, the gross monthly freight earnable under the Texas Company charter be represented by the letter A, and the expenses under that charter by the letter X, and the gross monthly earnings for the carriage of mules for the Government be indicated by the letter B and the expenses by the letter Y, it follows that, inasmuch as we do not know what the expenses X or the expenses Y amounted to from any evidence which is in the record, the relation between A minus X and B minus Y cannot be known.

Of course, it has already been decided in this Court that the fact that a charterer may earn more out of a requisition than he was earning under a charter party is not material on the question of frustration. *Earn Line*

Steamship Co. vs. *Sutherland Steamship Co., Ltd.* February 18, 1920.

The purpose of the appellant's argument in the present case in respect of the alleged earnings by the carriage of mules for the Government as compared with the earnings under the Texas Company charter is obviously made as a background for a claim that the requisition was secured by connivance of the owner for its own benefit.

This is clearly shown by the proof, documentary and otherwise, not to have been the fact.

As this claim of connivance has been stressed by the appellant it is necessary to go into the correspondence in some detail to illustrate the soundness of the appellee's position in this regard.

The good faith of the owner of the *Baron Ogilvy* is illustrated by its letter of the 25th of March, 1915, to the Captain. 482-486. In it the owner says, 483-485:

> "We have, of course, been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.
>
> "You are declared under an open charter for a cargo of Oil from Port Arthur, Texas, to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is

chartered from the States to the Cape and if necessary exhibit the charter party."

The Captain acknowledges receipt of this letter and the charter party under date of March 28th. 488.

On March 30th, the owner replied to the Captain's letter of March 28, which dealt with various details of his previous voyage and indicated to him again its intention to carry out its South African voyage for the Texas Company, saying, 496:

> "Our present intentions are to send you from the Cape Ports to Australia for bunkers and load home under contract from Pagoumene (New Caledonia) to Glasgow."

Captain Thompson confirms the orders that had been given him by the owner as to the voyage for the Texas Company. 403-404. He also testified that he made up his store list for a voyage from Port Arthur where he was to load for the Texas Company. This list, he says, would have been different from the store list out of New Orleans. 437-438.

Under date of March 31st, the owner received a telegram from Messrs. Harley & Company confirming their fears that the vessel might be requisitioned, reading, 498:

> "Admiralty Note *Baron Ogilvy* in London may require requisition her. Please post plan. Say when expect discharged."

The owner wrote to Messrs. Harley & Company under date of March 31st, as follows, 499-500:

> "We have your telegram of date from which we take it that the Admiralty have apparently

been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged."

On the 1st of April, 1915, the owner received a letter from a firm called Hogg & Robinson, asking for a ready vessel capable of carrying 4000 to 6000 tons, measurement, of hay, which it was stated the Director of Transports wished for Government service. 501-502.

Under date of April 1st, the owner also got a letter from Messrs. Harley & Company in which the owner's letter to Messrs. Harley & Company of the 31st of March was acknowledged, and in which Harley & Company pointed out that the fact that the steamer was already chartered from the States to the Cape and thence from New Caledonia to the United Kingdom would not be of any concern to the Admiralty if the country needed the steamer. 505-506.

Under date of April 2nd, Hogarth, replied to the letter of April 1st from Hogg & Robinson and suggested that Hogg & Robinson should call the attention of the Director of Transports to the number of vessels which had been requisitioned from the Hogarth fleet and to important contracts which they already had for the carriage of copper ore. 507-508.

Under date of April 2nd, Hogarth wrote to Messrs. Harley & Company advising them that Hogg & Robinson

had been asking information for handy tonnage for the carriage of hay and that they had suggested to Hogg & Robinson that they should call the Director of Transports' attention to the heavy commitments which Messrs. Hogarth had for any handy vessels. 510-511.

Under date of April 3rd, Hogg & Robinson acknowledged Messrs. Hogarth's letter of April 2nd and further urged the Government's requirement for prompt vessels for the carriage of 4000 to 6000 tons of hay. 513.

Under date of April 6th, Hogarth replied to Hogg & Robinson's letter of April 3rd and advised them that it had not any vessels in England, or shortly due there, with the exception of the *Baron Ogilvy* which was then in Milwall Dock, and they added, 515:

> "This vessel is, however, chartered to load in the States."

Messrs. Hogg & Robinson replied under date of April 7th that the *Baron Ogilvy* was suitable for the hay requirement, and desired to be kept posted as to her movements, adding that they understood from the Milwall Dock Authorities that she would possibly be clear, that is her cargo would be discharged, by Wednesday following. 518.

On the 9th of April Hogarth received two telegrams from Harley & Company.

The first which was sent at 1.13 p.m. and received in Glasgow at 1.54 p.m., read, 525:

> "*Baron Ogilvy.* We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later."

The second telegram was sent from London at 1.45 p.m. and received at Glasgow at 2.16 p.m., reading as follows, 520:

> "*Baron Ogilvy.* Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans, Avonmouth or Liverpool, Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so."

On April 9th, Messrs. Hogarth & Company acknowledged these two telegrams from Messrs. Harley & Company, and, 527, confirmed the telegram they sent in reply to the two telegrams from Messrs. Harley & Company. They wrote as follows (Italics ours):

> "We have intimated to Hogg & Robinson that the vessel is committed for further business that probably the requisitioning arrangement which you refer to will be that of another department and *it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.*"

Certainly this was a perfectly justifiable position and showed perfect good faith on the part of the owner Hogarth.

On April 9th Messrs. Harley & Company also wrote three letters to Messrs. Hogarth.

In the first of these, 529-531, they stated that they were sorry to advise Messrs. Hogarth that the Admiralty had informed them that the *Baron Ogilvy* was required

for the needs of the country and that a formal telegram of requisition was being prepared which would be received in due course. They expressed regret that the Admiralty had to take the steamer and a belief that the Government would not disturb any steamer's commitments if they could avoid it.

In the second letter they referred again to the notice of requisition by the Admiralty of the *Baron Ogilvy* and said that they believed it would suit the Admiralty's purpose just as well if they were to charter her from New Orleans to Avonmouth or Liverpool for mules at Thirteen pounds ten shillings and ten shillings gratuity for three or four trips, and also stated that they believed if they were authorized to approach the Admiralty they could arrange this use of the vessel. 522-523.

A third letter of April 9th Messrs. Harley & Company, 536-537, acknowledged Hogarth's telegram dealing with the Hogg & Robinson situation and replying to the two telegrams of April 9th received from Harley & Co.

In this letter Messrs. Harley & Company said that they did not know why Messrs. Hogg & Robinson were troubling Messrs. Hogarth, that the department of the Admiralty which Hogg & Robinson followed was quite distinct from the department which Messrs. Harley & Company were following, and added that they understood that the requisitioning of the steamer *Baron Ogilvy* was absolute. They enclosed a copy of the requisition terms. They also stated that they had pointed out to the Admiralty earlier in the day that the steamer was under commitment for other employment, that the Admiralty replied that they could not help that as they required the boat and that any claims that might subsequently

come forward would have to be met in the usual manner. 536-537.

On the 9th of April Messrs. Harley & Company wrote, without any authority from Hogarth, a letter to the Director of Transports referring to his verbal notice of requisition and suggesting that possibly the vessel could be chartered for the conveyance of mules on the same terms as the other *Baron* steamers which were operated in that trade. 532-534.

On April 10th a telegram of requisition was sent from the Admiralty at 8.48 a.m. to the owner, reading as follows, 538:

> "S.S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government service"
> "Transports"

On April 10th Messrs. Hogarth wrote Messrs. Hogg & Robinson, advising them that the vessel had been requisitioned, that she was the *ninth* vessel of their small fleet then on Government service, and hoped that the Admiralty would see fit to leave the rest of their fleet alone as they did not know of any firm of tramp shipowners with the same proportion of vessels on Government service as they had. 540-541.

Under date of the 10th of April, Messrs. Harley & Company wrote to Messrs. Hogarth & Company dealing generally with the situation and explaining how Messrs. Hogg & Robinson had been injected into it. They added, 544 (Italics ours):

> "You will now have received a formal telegram from the Admiralty requisitioning this steamer

under Royal Proclamation for Government Service.

"The Admiralty have also sent us a similar telegram.

"As they had not sent this message off last evening when we saw them *they could not proceed to discuss the alternative suggestion that we have in hand*, but we are seeing them at noon today and will advise you further."

This clearly indicates not only that the Admiralty insisted on requisitioning the vessel first and then negotiating as to trades afterwards but also that there was not any arrangement made with regard to the carriage of mules until *after* the vessel had been taken by the Government under requisition and that then, as the District Court suggests, the owner proceeded quite properly to arrange to make as good a freight as they could out of the Government business.

This arrangement was subsequently consummated through Messrs. Harley & Company in a series of letters and telegrams. 546-560, 572-578.

The testimony of Mr. Foley, of the Admiralty, confirms the facts of the situation as it has been above outlined.

He testified, 242-243 (Italics ours):

"Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?

(Question objected to.)

A. We had.

Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we

listened to what they had to say and did our best to avoid hardship, but *we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.*

Q. In those circumstances was it found essential to requisition the *Baron Ogilvy?* A. Yes. This ship was particularly suitable for our services; *we wanted her for the carriage of mules.*"

Again, 270-273, he testified. (Italics ours):

"Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply? A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. *It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break.* It was impossible for myself and the owners to come to an agree-

ment for the use of that ship. *I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.*

Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel? A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her? A. *Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship.*"

And again, 279-283, he testified. (Italics ours):

"Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy*. Would you look at the first letter to which my friend referred? A. 'With reference to your verbal notice of requisitioning this steamer.' *We told Messrs. Harley obviously that we were going to take that steamer.* The actual telegram sent on the 10th I think was at 8.18 A.M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of Transports? A. Not voluntary in any sense except this, that he was not bound *after the ship was requisitioned* to accept these conditions as to giving up fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarth have had his vessel free? A. No, *I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which there might have been his liability for punishment.*

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice."

Mr. Hogarth also testified as to his desire to carry out the Texas Company contract. *Hogarth*, 141-142.

Judge Hough, therefore, dealt with the situation below entirely correctly when he said, 705-706:

"As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

It is submitted that the owners' attitude was unexceptionable throughout and that with his ship in London —in the Lion's mouth, as it were,—a clearer case of Governmental *vis major* against them can with difficulty be imagined.

We can leave it with the remarks of Mr. Foley who knew all about the situation and who aptly said, on cross examination when questioned about the negotiations for the carriage of mules. 265-268:

"Q. Do you still say, in the light of the language used in those three letters, and in that tele-

gram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? *If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they offered at the market rate, and I took it, no, nothing of the sort.*

Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; *I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.*

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, *but all this is the sequence of the requisitioning of the ship.*

Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, *the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. I had something I wanted from him outside the ordinary requisition and it suited him to take that line.*

Q. The result of the arrangement was that you obtained something from him you would not have

obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so."

(5) *After notice of requisition the owner was not under any duty to try to resist the requisition or to get the vessel released.*

The vessel was taken under an undoubted war power of a Sovereign Government. This being so, it can hardly be contended that because of private contract with a foreigner the British owners were under legal obligation actively to oppose their Sovereign in order to carry out their private contract.

In the case of *Earn Steamship Company* v. *Sutherland Steamship Company, Limited*, 254 Fed. 127, the question involved the requisition of a vessel under a time charter, where the profits to the owners were greater under the requisition than under the charter. In dealing with a criticism by charterers of the owners' compliance with the telegram of requisition, Judge Learned Hand, in 254 Fed. at p. 129 said:

> "Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' compliance in its telegraphic answer. It appears to me somewhat naive to suppose under such circumstances as then existed that the British Admiralty made requisitions dependent upon the consent of the ship owner. That the respondents were eager enough to have their ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous and to substitute the Admiralty hire, but

that this attitude of his had any effect upon the result seems to me a thin supposition."

Upon appeal of that case the Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Hough, discussed the possibility of resistance by an owner to the requisition of a vessel, and said in part:

"Thus the question is reached whether in obeying the order, Sutherland yielded to that restraint of princes excepted in the charter party.

"It is here to be noted that the charter was not a demise. Subject to the chartered right of Earn Line, the ship-master was the owner's master, and the ship, through that master, in the owner's possession. (*The Santona*, 152 F. R. at 518). Therefore in legal contemplation the vessel was taken or received from the owner and not from the charterer.

"On the question last stated appellant offers two propositions: (1st) The clause refers merely to physical restraint of the ship; an order to the owner is not within its meaning. (2d) The order was "*ultra vires*";—meaning that it was not in accord with English municipal or constitutional law.

"The first proposition is untenable. In times past, when a vessel left port, she disappeared from her owner's ken; there was no means of communicating with her except by other ships like her, and electricity and steam did not keep owner and ship in constant touch. In such times force, governmental or other, was more swiftly and more usefully exerted on the ship than on the owner. Now it is more efficacious to act on the ship through the owner, and (so to speak) requisition or comman-

deer the owner, and through him his vessel; putting upon that owner the same necessity of obedience that in former days was exercised on the master wherever the ship might be. The theory has not changed, but the method of application has been modernized. The fundamental essential of a restraint of rulers is that the restraining act should be governmental (*Northern etc., Co.* v. *American, etc., Co.*, 195 U. S. at 467 *et seq.*). That the restraint need not be physical was in effect held in *The Styria*, 186 U. S. at 18; and see cases cited in *The Athanasios*, 228 F. R. 558. The matter is fully covered by Lord Reading in *Sanday* v. *British, etc., Co.*, 2 K. B. (1915) at 802; in which case, on appeal to the House of Lords, it was said (in affirming the judgment) that "the circumstance that force was neither exerted nor present (is immaterial) for force is in reserve behind every state demand"; and it was added in substance that it would be "a strange law" which required one to resist "till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey and which he might have successfully resisted either by violence or by process of law, a question might arise. * * *

"The evidence here is plain that resistance was impossible; all that Sutherland could have done would have been to say 'I refuse to order my captain to report to the Admiralty agents; I prefer to leave my ship in the service of a neutral charterer.' The supposed case need not be pursued;—to the probable and proper punishment of such an act. *No citizen or subject is by lawful private contract either required to or justified in proceeding to such lengths in resisting or evading the compulsion of his government.*"

A disregard of the requisition when the vessel was in London to the extent of attempting to send the vessel to Port Arthur in defiance of the requisition would not have been beneficial to the charterer, because the vessel would have been taken in any event. *Foley*, 246.

Incidentally there can be little doubt but that the owner would also have been subject to heavy penalties and possibly the loss of all remuneration for the use of its ship.

In *Gans Steamship Line* v. *the British Steamship Frankmere*, 262 Fed. 819, a similar question came up for decision in the United States District Court for the Eastern District of Virginia. In that case the vessel was at Genoa when requisitioned. The compensation received from the Government under the requisition of a time chartered ship was greater than that which would have been received under the time charter in force at the time of the requisition. Consequently, the owners got paid more under the requisition. Judge Waddill sustained the requisition as an exercise of Governmental *vis major*.

Concerning the efforts made in this instance to prevent requisition or secure the vessel's release therefrom, Mr. Foley testifies as follows, 246, 249:

> "Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you had requisitioned her in the way you have stated, to have her released?
>
> (Question objected to.)
>
> "A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs.

Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.

"Q. Having regard to the nature of the employment which if the vessel had not been requisitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released? A. Certainly not.

"Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interest of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

The argument that it was unfair of the Government to requisition more of the Hogarth steamers because they had already requisitioned such a large number, was frequently brought to the attention of the Admiralty. *Hogarth*, 188.

In cases of the requisition of the *Baron Yarborough* and the *Baron Kelvin*, which were released from requisition, were under charter to carry pyrites, a cargo which was of prime importance to the Government. *Hogarth*, 189-190. The carriage of petroleum to South

African ports by the *Baron Ogilvy* did not furnish a similarly cogent argument for her release.

In this regard Mr. Hogarth testified, 189-191:

> "Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country."

and again 210-211:

> "Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.
>
> "Q. Have you considered you had any argument worth putting forward to the Admiralty in respect of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape."

Mr. Foley testified to the same effect, *Foley*, 248:

> "Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules

from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

(6.) *The effect of the Act of the British Government was to frustrate the charter party which is the subject matter of this suit and to discharge both parties thereto from all further obligations thereunder.*

Under the provisions of Clause 8 of the charter party, the lay days for loading were not to commence before April 15, 1915, and if the vessel was not ready to load by 2 p.m. on May 15, 1915, the charterers had the option of cancelling. 456-457.

In other words, this was a charter party for vessel's delivery in April-May, 1915, at Port Arthur and for a voyage immediately thereafter to South Africa. It is shown by the evidence that the Texas Company had commitments for the carriage of the cargo which they contemplated sending by the *Baron Ogilvy*. They subsequently lifted the cargo on the *Vimeira*, which was chartered April 14, 1915, to carry the cargo in question. 104, 445.

It is interesting to note that the *Vimeira* charter also was for loading *between April 15 and May 15, 1915*. 445.

It is an uncontroverted fact that the steamship *Baron Ogilvy* did not get out of Government service until October 20, 1915. *Embassy Certificate*, 131; *Foley*, 253.

Thus the requisition of the vessel occupied many months more than the voyage under the charter of the

Texas Company would have occupied and the commercial use of the vessel during the period when the charter of the Texas Company would have been performed was rendered entirely impossible by the act of the British Government.

At the time of the requisition, therefore, the release of the vessel during the period when the Texas Company charter under ordinary course would have fallen to be performed was not expectable. The owner took this position at once in communicating with the Texas Company and advised the Texas Company under date of April 12th of the fact that the vessel had been requisitioned and would not be able to carry out her charter. 102-103.

The intimation contained in the libelant's brief that the requisition might have been only for a few weeks is entirely misleading because the suggestion of a short requisition was involved in a letter from Hogg & Robinson regarding a requisition for service in the carriage of hay, 502, whereas what the Government really wished the vessel for was the carriage of mules, and that was the trade for which she actually was used. Prompt ships were urgently needed, the *Baron Ogilvy* was a prompt ship and the Government took her irrespective of her private commitments. *Foley*, 242-243.

The Admiralty used the *Baron Ogilvy* for trade from New Orleans to Avonmouth, which was an entirely different trade from the trade which was contemplated in the Texas Company charter namely from Port Arthur to South Africa.

A more perfect case of the frustration of a venture by *vis major* would be difficult to find.

Great emphasis is, apparently, placed by the appellant on the fact that the charter party in the present case did not contain the usual restraint of princes exemption.

But an exception has not anything whatever to do with the doctrine of frustration.

An exception may be an excuse for the temporary non-performance of a contract which is in existence, but the frustration of a contract means that the contract is entirely destroyed by some supervening occurrence rendering it impossible of performance.

In the present case, the contract was entirely destroyed because the requisition was the interference of a *vis major* and the period of requisition was indefinite; thereby the subject-matter of the contract, *i. e.*, the use of the *Baron Ogilvy* for a voyage from Port Arthur to South Africa commencing April-May, 1915, was rendered wholly impossible. *Embassy Certificate*, 130; *Requisition Telegram*, 538.

Annexed to this brief is an appendix which contains a list of cases dealing with the frustration of charter parties and other contracts.

We shall now discuss some of these cases which seem peculiarly to apply to the situation in the present case.

The decision of the Supreme Court of the United States in the case of the *Allanwilde Transport Company*

v. *Vacuum Oil Company*, 248 U. S. 377 (1919) is a flat decision supporting Judge Hough's decision in the present case.

In that case the *Allanwilde*, a sailing vessel, loaded at New York for Rochefort, France, a port in the war zone, and sailed September 11, 1917. Her charter party did not contain any exemption of restraint of princes.

On September 28th, while the vessel was at sea, unknown to the Master, a Government ruling became effective, preventing the clearance of sailing vessels bound for the war zone.

Owing to severe weather the vessel was compelled to put into New York for repairs, after which she was prevented from continuing her voyage by the Government ruling.

The Circuit Court of Appeals for the Third Circuit certified the following questions to the Supreme Court:

> "(1) Was the adventure frustrated and was the contract evidenced by the charter party and by the bill of lading issued to the oil company, dissolved so as to relieve the carrier from further obligation to carry oil?
>
> "(2) Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

The Supreme Court answered both questions in the affirmative.

In delivering the Court's opinion, Mr. Justice McKenna said at pages 385-6 (Italics ours):

> "It is urged, however, that there is no provision in the contract (charter party and bill o

lading) of the Oil Company excepting 'restraint of princes, rulers and peoples' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. *And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12.*"

That the doctrine of frustration is not affected by the presence or absence of exceptions is also shown in the case of *Shipton-Anderson & Co.* v. *Harrison Brothers Co.*, 21 *Com. Cas.* 138 (1915).

In that case the sellers sold to the buyers by a contract dated September 2, 1914, about 42,800 centals of winter wheat ex S. S. *Dalecrest*, ex grain storage, payment cash within seven days against transfer order.

There were not any exceptions in the contract.

At the time when the contract was made the sellers were the owners of a parcel of 42,800 centals of winter wheat which had been discharged out of the steamer named and was then lying in a grain warehouse. No transfer order was given.

On September 4th the sellers were verbally informed that the wheat had been requisitioned by the British Government and on September 8th a written requisition was sent them. The buyers claimed damages from the sellers for non-delivery. Arbitration ensued in pursuance of the rules of the Liverpool Corn Trade Association and the arbitrators referred certain questions in the case to the Court of Kings Bench in pursuance of the provisions of the British Arbitration Act.

The Court held that inasmuch as the delivery of the wheat by the sellers to the buyers had been rendered impossible by the requisition, the sellers were excused from performance of the contract in spite of the fact that the contract did not contain any exception.

The case was heard by Lord Reading, Mr. Justice Darling and Mr. Justice Lush.

After determining that title had not passed to the buyers by reason of the fact that there had not been any delivery of warehouse certificates, Lord Reading proceeded to discuss whether the sellers were excused from performance of the contract owing to the requisition, and called attention to the fact that the contract was absolute in its terms, and then said, at page 141:

> "No doubt there are cases on either side of the line, and the application of the principles of law are matters of some nicety and difficulty, but I have come to the conclusion that in this case the sellers are excused from performance of the contract, and that the contract must be taken as a undertaking by the sellers to deliver the goods subject to the condition, that if the British Government requisition the goods and render it im

possible for the sellers to perform their contract they should be excused from the performance of it. The conclusion at which I have arrived is, I think, supported by the decision in *Nickoll & Knight* v. *Ashton, Edridge & Co.* [6 Com. Cas. 150, 152; (1901) 2 K. B. 126, 132; 70 L. J. K. B. 600, 603], and also by the decision in *Baily* v. *De Crespigny*, [(1869) L. R. 4 Q. B. 180, 186; 38 L. J. Q. B. 98, 102]. The particular passage in *Nickoll & Knight* v. *Ashton, Edridge & Co.* upon which reliance is placed by Mr. Raeburn on behalf of the sellers is in the judgment of A. L. Smith, M. R., where he quotes from the judgment of Blackburn, J., in *Taylor* v. *Caldwell* [(1863) 3 B. & S. 826 at p. 833; 32 L. J. Q. B. 164, 166], laying down a rule as to the construction of certain contracts, which rule is as follows: 'Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' It is to be observed that in that rule stress is laid upon the perishing of the thing which was the foundation of the contract before breach. The principle of the case seems to me equally applicable to that now under consideration

where by reason of the lawful act of the executive the thing, in a sense, has perished. Certainly through the act of the British Government it is no longer in the power of the sellers to perform their contract. * * *

"It must, however, be clearly understood that we are not by this decision in answer to the questions put to us deciding that if the sale had not been of specific goods that the sellers would have been excused; but it is because the sale was a sale of specific goods and was therefore rendered impossible of performance when the goods were lawfully requisitioned by the British Government that I come to the conclusion that the sellers are excused."

Mr. Justice Lush dealt with the whole question very neatly at page 143, as follows:

"Whenever it is necessary to consider, as it is in this case, whether a supervening impossibility of performance excuses the contracting party, one must of necessity consider what the nature of the impossibility is, and what has given rise to it. Willes, J., in *Clifford* (Lord) v. *Watts* [(1870) L. R. 5 C. P. 577, 586; 40 L. J. C. P. 36] stated the principle in this precise way: 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him.' In this case the impossibility which supervened after the making of the contract was an impossibility created by an act of State. The moment these goods were requisitioned it became the duty of the vendors to comply with the requisition, and an act of State made it contrary to the duty of the

vendors to carry out the contract to the buyers. The case therefore clearly falls within the principle that has been so often acted upon that the vendors are excused from performance of their contract where it is impossible for them legally to perform their obligation owing to an act of State and not through any default on their part. The vendors here have committed no breach of their contract, and I think that the question put by the arbitrators should be answered in the way indicated by my Lord."

In *Nickoll* v. *Ashton* (1901) 2 K. B. D. 126, where the defendant had sold a cargo of cotton seed to be shipped on the steamship *Orlando* in January, when owing to a stranding of the *Orlando,* without any fault on the seller's part, she was unable to carry the cargo, it was held that the contract was frustrated.

In *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, the lease of a music-hall was held to be frustrated by the destruction of the hall by fire.

In *Appleby* v. *Meyers* (1867) L. R. 2 C. P. 65, there was a contract to supply and instal machinery in a building. After partial instalment, the premises and the machinery were destroyed by fire, and Mr. Justice Blackburn held that both parties were excused from further performance.

In *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1917) 2 K. B. 1; (1918) Appeal Cases 128, there was a contract for the construction of a reservoir in 1914. In 1916 the Ministry of Munitions, under the Defense of the Realm Act, ordered the defendants to stop work and to sell such material as it had on hand to munition factories.

This governmental act was held by the House of Lords to have terminated the contract.

In *Marks Realty Co.* v. *Hotel Hermitage Co.*, 170 App. Div., 485 (N. Y.) the defendant agreed to pay for an advertisement of its business in a "souvenir and program" of a certain national yacht race, when the program should be published. The race was cancelled, owing to the European War.

It was held that since the holding of the race was of the essence of the contract, defendant was excused from performance.

The Court said at page 485:

> "This is not where a promisor has failed to guard himself against a *vis major*. It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment."

In *Southern Railway Co.* v. *Wallace* (1911) 175 Ala., 72, 56 So. Rep., 714, it was held that quarantine regulations made subsequent to the contract, preventing the shipment of cattle, excused performance.

In *Gesualdi* v. *Personeni* (1911), 128 N. Y. Sup. 683, performance of the contract for the sale of patent medicines was excused upon the sale becoming illegal by subsequent government regulations adopted under the Federal Pure Food Law.

In *Hildreth* v. *Buell* (1854), 18 Barb., 107, failure t perform an agreement to furnish iron for locks in a canal being constructed was excused on account of the subsequent act of the legislature suspending the work.

In *Stewart* v. *Stone*, 124 N. Y., 500, it was held that the performance of a contract to manufacture cheese and butter, market the same and deposit the proceeds to the credit of the plaintiff who delivered milk for that purpose, was excused by the destruction of the factory by fire.

The doctrine of frustration of commercial contracts is an outgrowth of the fact that time is of the essence in such contracts.

Situations constantly arise in which it is necessary that the parties should immediately know what their respective rights are.

When a charterer has made a voyage charter for the carriage of cargo, and has his commitment to the cargo owner to fulfill and when, as here happened, the vessel which he has chartered is prevented from performing the charter party, whatever may be the cause of that prevention, his first instinct and necessity is to secure another vessel to carry the cargo for which he is committed. That is exactly what was done in the present case when the Texas Company, on April 14th, evidently as soon as possible after the requisition, chartered the steamship *Vimeira* to lift the oil cargo which they expected to ship by the *Baron Ogilvy*. 104.

The fact that time is of the essence in these matters is shown by the universal custom of having every charter

party contain the so-called cancelling clause—such as the clause in the charter of the *Baron Ogilvy*, 456, 457,—providing that the vessel must arrive at a loading or discharging port on or before a certain date, failing which the charterer has the option of calling the contract off.

When a situation arises, such as arose in this case, it is of the essence of commercial law that the parties should know just what their rights are at the time when the trouble occurs.

The charterer must know that he is not in danger of having the chartered vessel cast back on his hands with a demand for performance on his part, and that he may safely go about to arrange other commitments.

The owner, on his side, ought to know whether in case the Government should suddenly change its mind, he would be free to deal with his vessel as he likes.

Suppose in the present case, for example, that suddenly the Government had changed its plan about using the *Baron Ogilvy* and had freed the vessel, say, about the 15th or 20th of April and she had proceeded to Port Arthur and arrived there before May 15th and demanded a cargo of oil from the Texas Company. The situation would then have been that the Texas Company would have had both the *Vimeira* and the *Baron Ogilvy* on its hands with, so far as appears, only one cargo with which to load them. It is not difficult to fancy the attitude which the Texas Company would have taken if such a thing had occurred. They, undoubtedly, would have said that the matter was all off when the *Baron Ogilvy* was requisitioned by the British Admiralty, and that the owner could not come back after the Texas Company had

got another vessel for the cargo intended for the *Baron Ogilvy* and demand a second cargo. The owner would have had his trip to Port Arthur in vain.

It is to guard against the possibility of just such situations as this that the doctrine of frustration has arisen and is a necessity in commercial law because parties must know their rights at once in order to feel safe in going ahead and making other arrangements when the subject matter of one of their contracts has failed.

It is submitted, that this is the only conceivable, workable commercial theory to be applied when something happens by operation of *vis major,* without fault of either party, which renders it certain that a vessel which has been engaged under a charter party cannot perform her contract.

The result would not have been any different in the present case if the *Baron Ogilvy* had been sunk, without her owners' fault, so that it was obvious she could not be raised in time to perform her contract, or if without her owners' fault she had been so badly burned that it was obvious she could not have been repaired in time to perform her contract. She was, as Judge Hough suggested, as entirely removed so far as the performance of the Texas Company contract was concerned, as if she had been destroyed. 708-709.

It is well settled that in commercial matters a contract for April shipment or delivery is not satisfied by a shipment or delivery in August or September, and so in charter parties a charter under which a vessel is to be delivered in April or May is quite a different charter from a commercial standpoint than a charter in which the vessel is to be delivered in October or November.

In other words, what is contracted for by a charter such as that of the Baron Ogilvy is the commercial service of the vessel to the charterer for a voyage commencing at the port of loading at the time named. *Dorrance* v. *Barber*, 262 Fed. 489 (1919); *Connell &c. Co.* v. *Diederichsen & Co.*, 213 Fed. 737; *Bowes* v. *Shand*, 2 App. Cas. 455.

A voyage which would commence in October or November is not the same voyage in a commercial sense, although the port of loading and destination might be the same.

It is perfectly clear, therefore, that the fact that the requisition rendered the intended commercial voyage absolutely impossible of performance, and put an end to the charter party, excused both parties from any liability in damages.

This is the principle underlying the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Lewis* v. *Mowinckel*, 215 Fed. 710 (1914), affirming a decision by Judge Ward, in which a libel was filed by the charterer of the steamship *Moldegaard* to recover damages from her owner for failure to perform a charter party dated September 16, 1911. The charter was for about one year, beginning from the time of her delivery to the charterer, upon the completion of a charter to the Munson Steamship Line, which was then being performed. The flat period of the Munson charter expired January 7, 1912. While under the Munson charter the *Moldegaard* stranded on one of the Bahama Islands, was given up as ost, finally was salved, and was again ready for service in February, 1913.

This Court emphasized the fact that the parties when they were entering into a charter could not be interpreted to have intended a charter which began more than a year after the expiration of the Munson charter on January 7, 1912, and said, at page 711:

> "We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, released them from liability under the charter. It excused both parties, but did not make a new contract."

The same point is emphasized in the opinions of the House of Lords in the case of *Bank Line, Ltd.* vs. *Arthur Capel & Co.* (1918), 35 T. L. R. 150.

In that case a steamship, the *Quito,* was chartered from her owners by a charter party dated February 16, 1915, with delivery date not before April 1st or after April 30th. The charterers did not cancel, although the vessel was not ready by the cancelling date, and whilst the vessel was preparing for service under the charter she was requisitioned by the British Admiralty for an indefinite period.

In August, 1915, the owners received an offer from third parties for the purchase of the vessel provided they could get her released from the requisition. They succeeded in getting her released by substituting another vessel belonging to them. The next day the charterers called on the owners to deliver the vessel under the charter. The owners contended that the charter had been

frustrated by the requisition and in an action by the charterers against the owners for a declaration that the charter had not been frustrated, the House of Lords held that it had been frustrated and that the requisition ended all rights between the parties and left the owners free to sell the vessel as they had done.

The Lord Chancellor, Lord Finlay, said, 35 T. L. R. at page 152:

> "The charter was to be for 12 months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for 12 months from April was clearly very different from a charter for 12 months from September. In such a case the adventure contemplated by the charter was entirely frustrated, and the owner when required to enter into a charter so different from that for which he had contracted was entitled to say '*non haec in foedera veni*'."

Lord Sumner, who is generally considered by the English bar as the best commercial Judge in England at the present time, said at page 153:

> "What then was the nature of the charter? It was not in form an April to April charter but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually

have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring was not quite the point, for this was not the old comparison of a summer with a winter voyage. In either case she would have been on hire for each month of the twelve and the exact cycle of the seasons would make little difference to her. What was important was this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an undubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business was one that required that they should look ahead and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce were very serious. Lord Justice Scrutton asked himself if the September to September employment would be in substance the same employment as that from April to April. He (Lord Sumner) agreed with him that it would not, and he thought that the uncertainties of the intervening period in time of war both emphasized the difference between the two and added to the gravity of the lapse of time taken by itself."

Later on, in his opinion, Lord Sumner adopted, as the best definition of a frustration which results in the dissolution of a commercial contract, a remark of Lord Dunedin in *Metropolitan Water Board v. Dick, Kerr & Co.*, 1918 A. C., at page 128, which was:

> "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted."

At page 156, after discussing other definitions and the nature of frustration, Lord Sumner said (italics ours):

> "For his own part he inclined to prefer the expression already quoted from his noble and learned friend Lord Dunedin, and substantially adopted by Lord Justice Scrutton in the Court of Appeal.
>
> "*Applying these considerations, he was of opinion that the requisitioning of the Quito destroyed the identity of the chartered service, and made the charter, as a matter of business, a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party.* Both thought its result was to terminate their contractual relation, and as they must have known much more about it than his Lordship, there was no reason why he should not think so too. He would allow the appeal."

Lord Wrenbury in his opinion, 35 T. L. R., at page 156, dealt with the question of the change of the time of service on the same principle.

In the case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1918), A. C. 119, the same point was stressed by Lord Dunedin, at page 128, who referred with approval to the old case of *Jackson* v. *Marine Insurance Co.* (1874), L. R. 10 C. P. 125, in which the same point was involved.

The principle of frustration is pointedly illustrated by the decision of Mr. Justice Atkin, now Lord Justice of Appeal, in the case of *Lloyd Royal Belge Soc. Anon.* v. *Stathatos*, 33 T. L. R. 390; affirmed 34 T. L. R. 70, which was the case of a voyage charter party on a time basis made December 1, 1916, whilst the vessel was at Gibraltar.

On December 2nd the vessel was detained by British authorities, because of her nationality and held until February 10, 1917. On December 12, 1916, the charterer gave notice that he considered the charter at an end.

The action was brought by charterers under the English practice for a declaration that the charter party was terminated, and for recovery of hire paid in advance.

Mr. Justice Atkin, in the Court below, said in the course of his opinion:

> "The substantial point that the plaintiffs raised was that the common adventure contemplated by both parties was frustrated by the detention and that the contract was thereby dissolved. * * * As to the doctrine of the frustration of the adventure, I have the advantage of a definition by my brother Bailhache approved by the Court of Appeal in *Admiral Shipping Company* v. *Weidner, Hopkins and Co.* (33 *The Times* L. R. 71;

(1917) 1 K. B., at p. 242), where he said: 'The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.'

* * * * * *

"But in this case it appears to me that the only adventure contemplated was one voyage outwards to New York and thence to Havre—a voyage which both parties knew the charterers desired to commence and end as quickly as possible. It is true that the parties adopted a form which is applicable to time charters and was called a time charter. In substance, the adventure was a charter for a voyage with freight payable at a time rate. In such circumstances the detention in question by the British Government for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged, appears to me to be just such a delay as falls within the doctrine as defined in the words I have quoted. I think, therefore, that the contract was dissolved by the happening of the detention, and I think that it was dissolved as from the date when the detention began, viz., on December 2. Should the right view be that the contract is not dissolved until one

of the parties elects to declare it dissolved, then the contract would be dissolved on December 12."

He also held that no recovery could be had of the hire paid in advance.

In the Court of Appeal the judgment was affirmed.

Lord Justice Pickford said at page 72:

"It was said that the charter was at an end because of what he would call for convenience the frustration of the adventure according to the doctrine laid down by Lord Haldane in the *Tamplin* case (32 *The Times L. R.*, 677; (1916 2 A. C., 397). It was not necessary to repeat the words used by Lord Haldane in that case. It was established that so far as this Court was concerned the doctrine which he would call the doctrine of commercial frustration of the adventure did apply to a time charter as well as to a voyage charter, and the question arose whether on the facts of this case the doctrine was applicable. He thought that the case was very near the line. But Mr. Justice Atkin had held that on the facts there was such an interruption of the common object of the parties as amounted to a frustration of the commercial adventure and that therefore the contract was dissolved. He (his Lordship) saw no reason to differ from the learned Judge's decision."

The hire paid in advance was not recoverable because:

"They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision

under which the money could be recovered. The charterers were not entitled to recover back the hire paid in advance. The appeal must be dismissed."

It is submitted that the *Lloyd Royal Belge* case goes further than the court is asked to go in this case, because the detention there might well have been of a more or less temporary nature whilst here the requisition would obviously wholly prevent the contemplated voyage being made at the contemplated time.

To the same effect are the decisions of the English Court of Appeal in the cases of the *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.;* the *Admiral Shipping Co.* v. *Weidner Hopkins & Co.* (1917) 1 K. B. 222, which were headd together in the English Court of Appeal.*

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* *The following are Leading Cases on Frustration:*

Cases relating to pure voyage charters or voyage charters on a time basis:

Lloyd Royal Belge Soc. Anon., 33 T. L. R., 390; 34 T. L. R. 70.
Allanwilde Transport Corporation v. *Vacuum Oil Co.* (1919), 248 U. S., 377.
Admiral Shipping Co. v. *Weidner, Hopkins & Co.*, 33 T. L. R. 71; (1916) 1 K. B. 429; (1917) 1 K. B. 222.
Civil Service Society, Ltd. v. *General Steam Navigation Co.* (1903) 2 K. B. D. 756.
Scottish Navigation Co. v. *Souter & Co.* (1916) 1 K. B. 675; (1917) 1 K. B. 222.
Geipel v. *Smith* (1872) L. R. 7 Q. B., 404; 1 Asp. Mar. Cas. 268.
Jackson v. *Union Marine Ins. Co.* (1874) L. R. 10 C. P. 125.

Cases Relating to Pure Time Charters:

Bank Line, Ltd. v. *Arthur Capel & Co., Ltd.*, 35 T. L. R. 150. (1918, House of Lords.)
Anglo-Northern Trading Co. v. *Emlyn, Jones & Williams* (1917) 2 K. B. 78; (1918) 1 K. B. 372.
The Countess of Warwick Steamship Co. v. *Le Nickel Soc. Anonyme* (1918) 1 K. B. 372; 34 T. L. R. 27.
Heilger's v. *Cambrian Steam Navigation Co.*, 33 T. L. R. 348; 34 T. L. R. 72.
F. A. Tamplin S. S. Co. v. *Anglo-Mexican Petroleum Co., Ltd.* (1916) 1 K. B. 485; (1916) 2 A. C. 397.
Chinese Mining and Engineering Co. v. *Sale & Co.* (1917) 2 K. B. 599.
Lewis v. *Mowinckel*, 215 Fed. 710.
Isle of Mull, 257 Fed. 798.

In a very thoughtful article in 1 Columbia Law Review, at page 529, Mr. Frederick C. Woodward suggests the following test as to whether impossibility of performance should excuse the defendant or not:

> "* * * And to empower a court, in every case in which the enforcement of the express terms of a contract would, on account of subsequently arising impossibility, result in hardship, to assume that had the attention of the parties been called to the contingency it would have been provided for, and to act upon the fiction that it impliedly was provided for, is simply to enable it to make

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Capel v. *Soulidi* (1916) 1 K. B. 439; (1916) 2 K. B. 365.
Furness, Withy & Co. v. *Rederiaktiegolabet Banco* (1917) 2 K. B. 873.
Earn Line Steamship Co. v. *Sutherland Steamship Co.* 254 Fed. 127 (1918); affirmed in C. C. A. February 18, 1920.
Gans S. S. Line v. *The British Steamship Frankmere*, 262 Fed. 819 (1920).

Cases relating to contracts other than charter parties:

Shipton-Anderson & Co. v. *Harrison Brothers Co.* (1915) 21 Com. Cas. 138.
Metropolitan Water Board v. *Dick Kerr & Co.* (1917) 2 K. B. 1; (1918) A. C. 119.
Appleby v. *Myers* (1867) L. R. 2 C. P. 65.
Taylor v. *Caldwell* (1863) 3 B. & S. 826.
Nickoll v. *Ashton* (1901) 2 K. B. D. 126
Howell v. *Coupland* (1876) 1 Q. B. D. 258.
Krell v. *Henry* (1903) 2 K. B. D. 740.
Stewart v. *Stone*, 127 N. Y. 500.
Marks Realty Co. v. *Hotel Hermitage Co.*, 170 App. Div. 485 (N. Y. 1915).
Southern Railway Co. v. *Wallace* (1911) 175 Ala. 72; 56 So. Rep. 714.
Gesualdi v. *Personeni* (1911) 128 N. Y. Sup. 683.
Hildreth v. *Buell* (1854) 18 Barb. 107.
Jones v. *Judd* (1850) 4 N. Y. 412.
The Federal Steam Navigation Company, Ltd. v. *Sir Raylton Dixon & Co., Ltd.*, 1 Lloyd's List, 63.
Baily v. *De Crespigny*, L. R. 41 Q. B. 180.
Butterfield v. *Byron*, 153 Mass. 517.
Spalding v. *Rosa*, 71 N. Y. 40.
Dolan v. *Rodgers*, 149 N. Y. 489.
Lovering v. *Buck Mountain Coal Company*, 54 Pa. St. 291.
Buffalo &c. Land Co. v. *Bellevue &c. Co.*, 165 N. Y. 247.
Walsh v. *Fisher*, 102 Wisc. 172, 179.

cf. Also MacKinnon on "*The Effect of War on Contracts*," submitted herewith.

a contract for the parties very different from that which the parties had made for themselves.

The great importance of guarding, so far as possible against such a result, is obvious. And it is believed, therefore, that a more restrictive rule must be found. With that end in view, the following is suggested: *If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure or performance should be excused.* In other words, the proper inquiry is not: Would the parties, as reasonable men, if their attention had been called to the contingency, have provided for it in their contract? That, as has been said, would be making a contract for them different from that which they had actually made for themselves. But: Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it, as already made by the parties."

It is quite clear that Judge Hough was entirely correct in saying in his opinion, 710:

"But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

> Without war, there had come to be recognized (*inter alia*) two well known grounds of dissolution by impossibility, destruction of subject-matter without any one's fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them."

Under the old decisions, fraud, illegality, duress, mistake, failure of consideration, payment, accord and satisfaction, discharge of surety, and accommodation did not excuse or constitute a defence in an action at law. 9 Harvard Law Review, 49.

The same thing was true at one time of impossibility of performance. Y. B. 22, Edward IV, pl. 26.

Formerly to avail of these defenses a defendant had to proceed by bill in chancery to restrain the proceeding at law. The equity jurisdiction was based on the ground that there was not any adequate remedy at law and prayed relief for the reasons which would now be stated in a defense in a case at law.

Indeed, in respect of some of the defenses above named, which are common enough now in actions at law, it might have been impossible to secure an injunction from the Chancellor.

It is well stated in a note on impossibility as a defense in 12 Harvard Law Review 501, at page 502 (italics ours):

> "Again, the defence of impossibility is seen to avail not only where there is an 'absolute impossibility,' but often, as in the principal case, where it would be unconscionable by reason of 'relative im-

possibility' to enforce the obligation. The very word 'impossibility' seems a misnomer. *Relief of this kind is more characteristic of the ethical attitude of equity than of the unmoral attitude of law. Moreover, the course of pleading furnishes a clue. If the accepted statement that the promise is conditioned be true, an obligor charged with an absolute promise should plead negatively; but impossibility is always an affirmative defence. This, again, betrays an equitable origin.* To look at the principal case * from this point of view, the covenant for quiet enjoyment is absolute, and it runs to the railway company as assignee. But it is against conscience to hold the lessors to their legal liability when the breach is authorized by an act of Parliament. The defence is conclusive, but it is not based upon the legal fiction of an implied condition. *It is rather an affirmative defence equitable in origin.*"

To the same effect is a note in 19 Harvard Law Review, at page 462, in which it is said:

"The equitable nature of this defence is further emphasized by the comparatively recent extension of it to cases where, not the subject-matter of the contract, but the means of performing it has been destroyed, [*Buffalo, etc., Land Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247] and, also, to cases where performance of a contract for personal services has become dangerous to life or health. An illustration of the latter extension is found in a late case where an English sailor was held justified in leaving his ship upon learning that it was laden with contraband of war. [*Sibbery* v.

* *Anderson* v. *Manchester S. & L. R. R.*, 52 Solicitors Journal 396.

Connelly, 22 T. L. R. 174 (K. B. D. Dec. 18, 1905]. This was no case of actual impossibility, nor can any implied intention be found; but conditions had totally changed since making the contract, and a reasonable man would have been justified in declining to assume the increased risk. [See *Walsh* v. *Fisher*, 102 Wis. 172, 179]."

Again in 15 Harvard Law Review, at page 63, there is a note discussing the case of *Buffalo, etc., Land Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247, in which the facts were as follows:

On selling certain land to the plaintiffs, the defendants contracted to build an electric railroad nearby, on which they would run cars as often as every half hour, and they further agreed that in case this promise were broken, they would buy back the land. The plaintiffs requested that the defendants be compelled to fulfill this last promise, as they had not run cars according to agreement.

The Court held the defendant's plea, that extraordinary snowstorms had compelled them to suspend operations for a time, was a good defence, on the ground that even if the contract was absolute in form, yet it contained an implied condition that, if performance were rendered impossible without the defendants' fault, they should be relieved of liability.

The editor has this to say at page 64 (italics ours):

> "The exceptions to the general rule that impossibility of performance is not a defence have crept into the law, not as excuses, but under the cover of implied conditions. In other words, the courts have held that the parties impliedly agreed there should be no performance if such con-

tingencies arose, and so, in truth, no breach of contract resulted. This cannot be regarded otherwise than as pure fiction. *As a matter of fact all thought of impossibility of performance is usually absent from the minds of the contracting parties. The defence is an equitable one,* and therefore, provided beneficial results follow, the courts would be justified in holding that the implied condition relieves liability, *not only where the subject-matter of the contract has been destroyed, but also where the means of performance have ceased to exist; that is, in general terms, wherever performance is rendered impossible without fault of the promisor.* Indeed, even if it is insisted that the condition must be one actually intended, it seems more likely that the broader condition would be in the parties' minds than the narrower one, limited to definite objects.

It is usually to the interest of both parties that a contract be carried out. Where performance is prevented by an event, against the occurrence of which neither can reasonably be held to have warranted, both suffer a loss for which neither is responsible. In such circumstances it seems highly unjust to throw all the loss on the one whose performance may happen to have been interfered with. Much wiser would it be to excuse the breach of the express contract, and allow a recovery for benefits actually rendered in a quasi-contractual action. Had this latter remedy been earlier recognized, it is not improbable that the courts would, before this, have admitted impossibility generally as a defence. This result may now be reached, however, by the adoption of the rule suggested by the New York court, which seems not only a natural successor of the previously recognized exceptions, but likewise eminently just."

To summarize, therefore, the doctrine of frustration of commercial contracts is an equitable doctrine not based on any fiction of implied condition, but on justice.

It is peculiarly applicable to commercial contracts because in them time is of the essence; and parties must know how to act, as soon as the fact which causes the frustration occurs.

This case is, it is submitted, a typical case for application of the rule, and the respondent was freed of all liability by the requisition.

(7) *The cases cited by the Petitioner, in which it is held that foreign governmental interference is not an excuse for non-performance of the contract, are not now the law under the better considered authorities here and in England and, furthermore, are distinguishable from this case on the ground that the governmental interference therein involved did not involve destruction of the subject matter of the contract.*

Furness Withy & Co. v. *Rederiaktiegolabet Banco*, 23 Com. Cas. 99, 103, was not a case of frustration. The Court, in that case, merely held that under the terms of the charter which included a "*restraint of princes*" clause the charterer was entitled to use a Swedish vessel only between such ports as the Swedish Government permitted.

There is a dictum to the effect that if there had been no "restraint of princes" clause the mere fact that the contract was illegal under the law of a foreign state to which one of the contracting parties belonged, would not make the contract illegal or unenforceable if it were an

English contract to be construed and enforced according to English law.

The respondent herein need not deny this dictum. His contention is simply that where the subject matter of the contract has been, in effect, *swept out of existence* by some *vis major* it is immaterial that this result is caused by the action of a *foreign* government. It will be noted that in this *Banco* case the vessel was not taken from the parties. The vessel could still be used, between Swedish ports. This narrowed the range of her use, but did not prevent it.

A similar situation often arose in respect to British time chartered ships during the war, when German and Austrian ports were illegal for them yet the charter continued operative for use to non-enemy ports. The charter was merely narrowed not destroyed.

Rederiaktiebolaget Amie v. *Universal Transportation Company, Inc.*, 250 Fed. 400 (1918), involved a contract to purchase a Swedish ship, payments being made in the form of charter hire, the owner to deposit a bill of sale of the vessel with an American Trust company. The deposit of the bill of sale was not made, the owners claiming that Swedish law prevented.

The Court below held this was no excuse and in the Circuit Court of Appeals for the Second Circuit Judge Ward, speaking for the court, said:

> "No action of the Swedish Government would excuse the defendant from its covenant to do so (deposit a bill of sale), there being no exception in the agreement like that common in charter parties and bills of lading, of arrests and restraints of princes. *Nor did the evidence adduced show any*

> *such restraint by the Swedish Government.* Therefore the Court properly held as a matter of law that the defendant having had from December 10, 1915 to April 5, 1916 to deposit the bill of sale with the United States Mortgage and Trust Company, had breached its contract in not doing so."

As the evidence failed to show restraint by the Swedish Government, the Court's statement as to the possible result if the Swedish Government had prevented the deposit of the bill of sale, is, it is submitted, pure dictum.

This contract of sale had been entirely executed on one side. The vessel had not been requisitioned by any government or otherwise removed from the control of the parties. Therefore this case cannot be considered as an authority in the instant case, because the subject matter of the contract—the use of the vessel—was not removed from the control of the parties in such a way that the purpose of the contract could not in part at least be accomplished.

If Sweden had seized the *Ada* the situation would be different.

Jacobs v. *Credit Lyonnais* (1884), L. R. 12 Q. B. D. 589, was a contract made by two Englishmen for the sale of 20,000 tons of esparto to be shipped from Algeria to England. Nine thousand tons were in fact shipped and shipment of the balance was prevented by insurrection in Algeria, the workers being intimidated and the military authorities by their commands preventing collection of esparto.

It should be noted that in that case there was not a separable contract, but one for the delivery of *20,000*

tons, of which almost one-half had been delivered. There was therefore no sweeping away of the *whole* subject matter of the contract. The purpose having been almost fifty per cent. accomplished, the Court could not look at the unperformed part as a separate contract for the delivery of 11,000 tons, but was compelled to consider the whole contract.

The case is, therefore, not on all-fours with the present case, where the whole subject matter was entirely removed from the control of the parties and no part of the purpose of the contract had been or could be accomplished.

In the recent English case of *Ralli Brothers* v. *Compania Naviera Sota Y Aznar,* (1920) 2 K. B. 287, Lord Justice Scrutton deals with the case of the *Credit Lyonnais* and distinguishes it from a case where both parties are prevented from performing a contract by foreign law, as follows, at page 301:

> "Great reliance was placed by the appellants on the case of *Jacobs* v. *Credit Lyonnais* (12 Q. B. D. 589). The headnote in that case speaks of 'the prohibition by the constituted authorities of the export of esparto from Algeria.' I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and Government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce 'force majeure', which would be a defence by the French law, into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen."

Tweedie Trading Co. v. *James P. McDonald Co.*, 114 Fed. 985 (1902) was similar to the English case of *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. D. 589, in that the contract had been partly performed and therefore the whole subject matter of the contract was not swept away in the same manner as in the instant case.

It was not a charter party case, but a breach of contract to supply laborers, full performance of which was prevented by the law of Barbados.

The case of *Tweedie Trading Co.* v. *McDonald*, 114 Fed. 985, is criticised as a very narrow decision in 16 Harvard Law Review, at page 64. The tendency to a broader rule in this country is noted. It is there said in a note:

> "This case is apparently the first in this country in which the point was involved, and, in following the English rule, it would seem to oppose the present commendable tendency of some American Courts to extend the scope of impossibility, as an excuse. See *Lovering* v. *Buck Mountain Co.*, 54 Pa. St. 291; *Buffalo, etc., Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247. See 15 Harv. L. Rev. 63, 418."

As is shown below the English rule has now been changed and impossibility by foreign and domestic law is now on the same footing and as an excuse for nonperformance of a contract.

The cases of *Liverpool* v. *Phenix Insurance Co.*, 129 U. S. 397, and *China Mutual Insurance Co.* v. *Force*, 142 N. Y. 90, are to the effect that unless the parties have some other law in mind at the time of making a contract its construction, nature and obligation are to be deter-

mined by the law of the place where it is made. Where one party, therefore, has an excuse for non-performance under some foreign law, if the excuse is not valid under the *lex loci contractus* he will not be excused.

The appellant has cited various other cases which are not authorities against the proposition that the charter party was frustrated in this case.

We have ventured to add as Appendix A to this brief a differentiation of the principal cases cited by the appellant from the situation that existed in the instant case.

The respondent herein is not claiming a defence under foreign law. It claims a good defense *under American law*, on the ground that the contract of charter-party was frustrated by the Governmental Act of the British Government, hence these cases are beside the point.

Under English decisions it is settled that if foreign law prevents both parties from performing a contract, neither has an action against the other even if the contract be absolute.

Ford v. *Cotesworth*, 1868, L. R. 4 Q. B. 127; affirmed L. R. 1870, 5 Q. B. 544.
Cunningham v. *Dunn*, 1878, L. R. C. P. D. 443.
Ralli Brothers v. *Compania Naviera Soto Y Aznar*, 1920, 2 K. B. 287, (Court of Appeal.).

In *Ford* v. *Cotesworth*, L. R. 1868, 4 Q. B. 127; affirmed L. R. 5 Q. B. 544, a charter party for a full cargo provided that the ship should proceed to Lima or Valparaiso, as ordered, and there "deliver the said cargo in the usual and customary manner, agreeable to bills of lading, and so end the voyage."

She was ordered to Lima, and arrived at Callao, the port of Lima on March 1st. Goods could only be landed

there by launches or lighters provided by the merchant and only through the Custom House.

Whilst the ship was unloading, about April 11th, the authorities refused to allow any more cargo to be landed at the Custom House in consequence of anticipated danger from the Spanish Fleet in the neighborhood. About the 18th the ship was ordered to move out of the expected line of fire of the Spanish Fleet.

On the 26th, the ship had, on peremptory orders, moved away several miles and did not return until May 12th, when the discharge was proceeded with and finished.

It was held by the Exchequer Chamber, affirming the decision of Justice Blackburn in the Queens Bench that inasmuch as both parties were prevented from performing their contract by the intervention of the authorities at the port of discharge, the shipowner could not recover for demurrage.

Kelly, C. B., said, *L. R. 5 Q. B.*, at page 547:

> "I was from the first prepared to agree with the Court of Queen's Bench in treating the delivery of the cargo at the port of destination as one entire act, in which both parties have to perform their parts; the defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship; and the plaintiffs were as much prevented from doing their part as the defendants. For had the defendants provided lighters, as it was contended they ought to have done, notwithstanding the order not to land any more goods, no doubt the authorities would have prevented the goods from being put on board the lighters; and it is absurd to suppose that the

goods could have been put into seventy or eighty lighters, and left floating in the harbour.

"It is clear that the effect of the order forbidding the landing of goods was to prevent, not only the defendants from performing their part, but also to render it practically impossible for the plaintiffs to perform theirs. Although it might not have been rendered physically impossible to put the goods over the side of the ship, yet the whole process of landing was prevented by a cause over which neither party had any control; and consequently, this action is not maintainable."

In *Cunningham* v. *Dunn*, 1878, L. R. C. P. D. 443, it was agreed by charter party that the steamship *Rainton* "now on her way to Genoa and Malta shall, with all convenient speed, after loading dead weight at Malta for owners proceed to a Spanish port, to be ordered by the charterer, or so near thereto as she may safely get", and there load from the charterer's factors the remaining measurement space for cargo for London. Restraint of princes was not excepted.

The charterer knew that the dead weight to be taken in at Malta was military stores and became aware before ordering the ship to Valencia that with military stores on board she would not by Spanish law be allowed to take other cargo there.

Efforts were made by the British Ministry at Madrid to allow the *Rainton* to load at Valencia, but this permission could not be obtained. She sailed away without loading immediately after her arrival at Valencia. The charterer sued for a breach of charter party.

Lord Coleridge, Lord Chief Justice, held that ship owners were not liable, citing, among other cases, *Ford* v. *Cotesworth.*

On appeal Lord Justice Bramwell said at page 447 (Italics ours):—

> "My judgment is for the defendants, and the grounds of it are, *first, that there was at Valencia a joint inability to perform the charterparty, and not a refusal by the defendants so to do;* secondly, that there was no warranty that the dead weight should be such as to allow the vessel to be loaded; thirdly, that if the defendants were bound not to disable themselves from taking on board the plaintiff's cargo, they did not know at the time of entering into the charterparty that they would so disable themselves; and, fourthly, that the plaintiff gave the defendants license to sail to Valencia with the military stores on board."

Lord Justice Brett, after recognizing that there was an absolute undertaking in the charter to load the cargo at Valencia, said at page 449:

> "In my opinion, the result of the evidence is that it was agreed that the defendants might take on board at Malta military stores as dead weight, and that after loading them the ship should proceed to Valencia. When she reached that port, in all respects but one, she was ready to load such a cargo as was mentioned in the charterparty; the defendants had done nothing inconsistent with their contract, and had done only what they were entitled to do. But by reason of Spanish law, and of the refusal of the Spanish Government to mitigate it, the defendants were not ready to load, but

> also the plaintiff was not ready to put the cargo on board: the law of Spain prevented the parties from performing what they had respectively undertaken to do. *Ford* v. *Cotesworth*, Law Rep. 4 Q. B. 127; 5 Q. B. 544, is in point, and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. For these reasons I think that the judgment of Lord Coleridge ought to be affirmed."

Lord Justice Cotton said at page 449:

> "When the defendants' ship reached Valencia, so far as the purposes of navigation were concerned, she was ready to receive the agreed cargo, but she was prevented from loading it because she had on board military stores. We may assume that the plaintiff had provided a cargo; but both parties were prevented from performing their respective undertakings by the prohibition of the Spanish Government. * * * All that the shipowners have done has been done in accordance with the terms of the contract. The charterer cannot say that the ship has not been loaded through the default of her owners: the act of the Spanish Government has prevented the contract between the parties from being carried out."

These decisions were adversely criticised in Carver on Carriage by Sea, (6th Ed.), Sections 129 and 616, page 801, but never, so far as counsel can find, by any Courts.

The English Court of Appeal, however, in the case of *Ralli Brothers* v. *Compania Naviera Soto y Aznar*, 1920, 2 K. B. 287, settled the question that *Ford* v. *Cotesworth* and *Cunningham* v. *Dunn* stated the law in the English Courts.

In the *Ralli Brothers* case, a Spanish steamship, the *Evetza Mendi*, was chartered by Englishmen under a charter made in London in July, 1918, to carry jute from Calcutta to Barcelona at fifty pounds freight per ton, one-half payable on sailing, balance payable on delivery. On arriving at the port of discharge it was found that by Spanish law which went into force in September, 1918, the freight rate payable on jute was fixed at a maximum of 875 pesetas per ton, much less than the charter party rate.

The receivers of cargo tendered the balance due according to Spanish law and the Spanish owners, as the charter did not contain any cesser clause discharging charterers from liability brought action in England against the charterers to recover the balance due up to the charter party rate.

The decision of Mr. Justice Bailhache disallowing this claim was affirmed by the English Court of Appeal, which followed and approved *Ford* v. *Cotesworth* and *Cunningham* v. *Dunn*, and distinguished the case of *Jacobs* v. *Credit Lyonnais*, 1884, L. R. 12 Q. B. D. 589.

The Lord Justices called attention to the recent decisions which had tended to excuse a party from performing a contract when his inability to do so arose not from his own fault but from the law or from the act of a government. In dealing with the specific point raised by the petitioner here that there was a difference between

performance rendered unlawful by the Government of the country where the Court was sitting, and the Government of a foreign country, the Court held there was not any difference in principle between impossibility due to foreign law, and impossibility due to domestic law.

The charter party had a restraint of princes clause in it but it was not provided that the exception should be mutual so as to excuse the charterers, and all the Lord Justices disregarded the exception—Lord Sterndale at page 292, Lord Justice Warrington at page 297 and Lord Justice Scrutton at page 304.

The Lords Justices were unanimous in dismissing the appeal.

They all express the opinion, Lord Sterndale, at page 291, Lord Justice Warrington at pages 296 and 297, and Lord Justice Scrutton, at page 303, that the case of *Barker* v. *Hodgson*, 3 M. & S. 267, 270, and other similar cases were wrongly decided and that the decisions in them would have been different if they had come up at the present time.

There could not be a more specific repudiation of the narrow doctrine contended for by the petitioners' counsel here, than the *Ralli Brothers* case.

Lord Justice Scrutton, at page 300, shows that a modern judge takes a very different attitude on the questions of international private laws and the observance of laws of foreign countries from the attitude that used to be taken. He says at page 300:

> "In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 553, where he says:
>
> •

'A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed'—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood."

Lord Justice Scrutton continues at page 300:

"The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties might have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine* v. *Jane*, Aleyn, 26, 27: 'When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' It was emphasized by Lord Ellenborough, in *Atkinson* v. *Richie* (1809) 10 East, 530, 533, where he said: 'No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.' And Lord Bowen as late as 1884 in the case of *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D. 589, cited Lord Ellenborough's approval of *Paradine* v. *Jane*, Aleyn, 26, 27, with approval. But the numerous cases, of

which *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1919] A. C. 119, is a recent example, most of which are cited in McCardie, J.'s exhaustive judgment in *Blackburn Bobbin Co.* v. *Allen & Sons*, [1918] 1 K. B. 540, 546, have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions from liability to be grafted by implication on contracts, if the parties by necessary implication must have treated the continued existence of a specified state of things as essential to liability on the express terms of the contract. If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. 'I will do it provided I can legally do so' seems to me infinitely preferable to and more likely than 'I will do it, though it is illegal'."

He says at page 302 (Italics ours):

"*Ford* v. *Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, would now, under the House of Lords decisions, be decided as a matter of course in favour of the party sued—for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions. In the Exchequer Chamber the case was again put on reasonable time, as distinguished from fixed time, and the ground that a cause of

delay affecting both parties must be considered in fixing reasonable time. In *Cunningham* v. *Dunn*, 3 C. P. D. 443, the ship was to proceed to Malta and load with dead weight, which both parties knew would be military stores, and then proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow cargo to be loaded on a ship which had military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that both parties being prevented by superior power neither was liable, citing *Ford* v. *Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544. The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford* v. *Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham* v. *Dunn*, 3 C. P. D. 443, the parties must be taken to have contracted on the basis that it should be legally possible to load that ship. At the time the two cases were distinguished from *Barker* v. *Hodgson*, 3 M. & S. 267, and other fixed lay days cases, on the ground partly of no fixed time partly on joint inability. It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Co.* v. *Andrew Weir & Co.* (1910) 15 Com. Cas. 101, where a clause excusing payment of hire in certain named events

was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though "strikes" were included in an exception clause. *But in my opinion at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country are wrongly decided; and this is the true view to be taken of early cases like Barker* v. *Hodgson*, 3 M. & S. 267, *decided before the Courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence or continuance of certain states of fact.* Bailhache, J., treats the case is one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where it is illegal to pay or receive such an amount; and such a joint act prevented by illegality as being within the principle of *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, and *Cunningham* v. *Dunn*, 3 C. P. D. 443, which are binding on him. *In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States.*"

The distinction between the case of the *Baron Ogilvy* and the other cases which have been cited by the petitioner, is that the charter in the case of the *Baron Ogilvy* was not merely rendered illegal by the law of Great Britain, but it was rendered impossible by an Executive act of the Government of Great Britain whilst the steamship was within Great Britain.

This is the distinction Judge Hough made in his opinion here. He said, 707-709:

> "The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libelant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co.* v. *Phenix*, 129 U. S. 397, nor *The Ada*, 250 F. R. 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.
>
> "That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purpose of this suit the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the absence of the 'restraint' clause, and the question is really reduced to its lowest terms, viz: whether the facts present a case of that 'impossibility of performance' which is and long has been

a recognized and growing reason for dissolving a contract."

The *Baron Ogilvy* charter was, therefore, terminated by what was in effect a destruction of the subject matter and all contract relations between the libelant and respondent which had arisen by reason of their having entered into the charter were entirely ended because:

1. The ship was entirely taken away from the charterer's service by Governmental *vis major* without fault on the part of the shipowner.

2. The subject matter of the charter contract, which was the commercial services of the steamship *Baron Ogilvy* for the charterer, in carrying case oil on a voyage from Port Arthur to South Africa with a cargo of petroleum in cases, commencing not later than May 15, 1915, was rendered wholly impossible.

3. The vessel was in fact not released from the requisition until a period much greater than would have been required for performance of the charter.

SECOND POINT.

IF THE COURT SHOULD FIND THAT THERE WAS NOT A FRUSTRATION OF THE CONTRACT OF CHARTER PARTY, WHEREBY THE RIGHTS AND OBLIGATIONS OF THE PARTIES THERETO WERE TERMINATED, AS ABOVE CONTENDED, RESPONDENT HOGARTH SHIPPING COMPANY, LIMITED, IS NOT LIABLE FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* UNDER THE EXPRESS PROVISIONS OF THE SPECIAL CLAUSE OF THE CHARTER PARTY.

They were a part of the contract when it was signed. This is shown by the charter party itself, *Libelant's Exhibit 2*, 470-473, concerning which Mr. Mouris, who acted as agent for the respondent Hogarth Shipping Company, Limited, testified. *Mouris*, 109-110.

The special clause which was attached to the charter party at the time of signing is, in part, as follows:

> "It is a condition of this charter and the charterers undertake that:—
>
> (1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.
>
> * * * * * * *
>
> (3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:

(a) *That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directors of the Committee as to routes, ports of call and stoppages.*

(b) *That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.*

* * * * * * *

"Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

"The above clauses to be incorporated in all bills of lading." 469-473.

These clauses amount in effect to a restraint of princes clause or at least to a provision that the vessel would be excused from not performing any voyage which the British Government forbade. They undoubtedly did forbid the charter voyage in the present instance.

The effect of the incorporation of such clauses in a charter party in excusing non-performance by the owner is evidenced by the case of *The Athanasios*, 228 Fed. 558, where the charter did not contain any *restraint of princes* exemption, but in which it was provided that bills of lading given under it should contain such a restraint. Judge Hough excused an owner from performance of a voyage charter on that ground.

Consequently, it is submitted the special voyage charter clause operates as an exception excusing non-performance of the contract by the owners.

THIRD POINT.

THERE IS NO LIABILITY ON THE PART OF RESPONDENTS HUGH HOGARTH AND SONS FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* OR SOME OTHER STEAMSHIP FOR PERFORMANCE OF THE CHARTER PARTY.

Respondent Hugh Hogarth and Sons did not own the Steamship *Baron Ogilvy* or any other vessel. *Hogarth,* 136, 139, 167-169. *Thompson,* 399, 400, 434. They were managers of the Hogarth Shipping Company, Ltd. 135. They acted throughout as agents, *Hogarth,* 136, 169-170, *Thompson,* 400, for an undisclosed principal whom the libelant has elected to sue.

Their agency is not disputed and appellant apparently admits that they are not subject to liability in this suit, a fact which, it is claimed, was not clear when the libel was originally filed. 88-89.

FOURTH POINT.

IF THE APPELLANT HAS ANY CLAIM AGAINST ANYONE ITS CLAIM LIES AGAINST THE BRITISH GOVERNMENT FOR HAVING TAKEN FROM IT THE USE OF THE STEAMSHIP *Baron Ogilvy.*

If the libelant has suffered any damage by reason of the act of the British Government its remedy lies by proceedings in the British Courts by petition of right against the British Government.

This is the intimation of the libelant's proper remedy in the event of a frustration of a time charter party by requisition contained in *Chinese Mining & Engineering Co., Ltd.* vs. *Sales & Co.* (1917), 2 K. B. 509, at the top of page 602.

It is settled that such a petition is maintainable by an American citizen or corporation because of the reciprocal rights given in our Courts for suits against the Government by English citizens.

> *United States* vs. *O'Keefe*, 11 Wall. 178;
> *Statutes of 23rd and 24th Vict.* July 3, 1860.

An instance where a British steamship owner was allowed to sue the United States Government in the Court of Claims in the case of *Maclay* vs. *U. S.*, 43 Court of Claims 90, and an instance of suit under the Tucker Act in our District Court is the case of the *New York & Oriental S. S. Co., Ltd.* vs. *U. S.*, 202 Fed. 311; 216 Fed. 61, which was tried before Judge Learned Hand and affirmed by the Court of Appeals.

In that case a stipulation was entered into by the District Attorney here that the statutes above mentioned and *U. S.* vs. *O'Keefe*, 11 Wall. 178 should be received as evidence of the fact that the Government of Great Britain accords to citizens of the United States the right to prosecute claims arising from express or implied contracts against the Government of Great Britain in the Courts of that country.

Thus the appellant is not remediless if it can make out a proper case. It has merely mistaken its remedy and its claim, if it has any, is against the British Government

direct, not against the ship-owner who has been guiltless of any breach of contract and whose charter party to the appellant was frustrated by the action of the British Government.

LAST POINT.

THE DECISIONS OF THE COURTS BELOW SHOULD BE IN ALL RESPECTS AFFIRMED WITH COSTS.

Respectfully submitted,

JOHN M. WOOLSEY,
Of Counsel.

January 15, 1921.

APPENDIX A.

Cases cited by appellant's counsel analyzed and distinguished.

1. The following cases mentioned at page 31 of petitioner's brief relate to whether the fact that foreign law prevents performance of the contract at the place where it is to be performed is an excuse under the *lex loci contractus*. As the appellees claim a frustration *under American law*, these cases are beside the point.

Lloyd v. *Guibert*, 6 Best & S. 100.

Liverpool v. *Great Western Company*, 129 U. S. 397.

China Mutual Insurance Company v. *Force*, 142 N. Y. 90.

2. *Howland* v. *Greenway*, 22 Howard 491, was a case of seizure of goods by the authorities in Rio de Janeiro, because the manifest was improperly made out. In an action on the bill of lading, recovery was allowed because the master of the vessel was negligent in not acquainting himself with the laws of the country with which he was trading, and duly conforming thereto.

3. *The Harriman*, 9 Wall. 161 (1868), involved a failure to deliver under an entire contract and it was held that since there was no delivery, no freight was due. There was no destruction of the subject matter of the contract in this case.

4. *The Progreso,* 50 Fed. 835 (1892), was not the taking of a ship, but merely a prevention of its use under the charter party, for a definite period of one month, known in advance. This is quite different from a requisition for an indefinite period.

5. *McDermott* (Ingle) v. *Jones,* 2 Wall. 1 (1864), held that a builder of a house, under contract, on land in which there was a latent defect which required subsequent repairs, was not excused by the latent defect from paying for the subsequent repairs. This is a quite different case from the instant case. If the land had *disappeared* in some manner it might have been analogous. It only involved greater difficulty and expense in performing the contract than was contemplated.

6. In *Blackburn Bobbin Company* v. *T. W. Allen, Ltd.,* 23 Com. Cas. 471, in the Court of Appeal in England, there was a contract to deliver timber from Finland on railroad tracks at Hull. Owing to the war the timber had to be sent via Scandinavia, instead of direct. It was held that the contract was not frustrated on the specific ground that the means of transportation of the timber was not of the essence of the contract and appeared to be unknown to the plaintiff. The Court very carefully distinguished the question involved from the question of frustration of charter parties, and said at page 472:

> * * * "There is really nothing to show that the continuance of that normal method (of transportation) was at the basis of the contract in the minds and intention of the contracting parties. The contract was merely one for the delivery of a

certain quantity of Finnish timber, free on rail at Hull. The plaintiffs did not know how the timber was normally conveyed from Finland to Hull and I see no reason for holding that the normal mode of conveyance must be deemed to have been in their mind and intention."

7. In *Hudson* v. *Hill,* 2 Asp. Mar. Cas. 278 (1874), a vessel was chartered to carry sugar from Barbados to London. The charter was made December 28, 1870, the vessel to "proceed forthwith" to loading port, laydays not to commence before April 1st. There was not any cancelling date in the charter. Owing to excepted perils, the vessel did not arrive until July 28th, which was the very end of the sugar season. The charterer refused to load and the vessel left for other business. The owner sued for breach of contract and the jury found that the date of arrival did not put an end, in a commercial sense, to the adventure. A verdict for the plaintiff was directed and the Court of Common Pleas discharged a rule to set aside the verdict, as against the evidence, saying that it was not impossible to load, although it was perhaps impossible to load at a profit.

The principle of frustration was therefore clearly recognized, but on the particular facts of the case it was found that the contract was not frustrated. We are not given the circumstances in detail, upon which the jury arrived at their conclusion and, therefore, it is submitted that the case cannot properly be considered as against the contention of the respondents in the instant case that the charter party of the *Baron Ogilvy* was frustrated.

Furthermore, *Hudson* v. *Hill* did not involve any taking of the vessel or removal of it from the control of

the parties, but simply a delay in reporting at loading port, which is quite a different matter.

8. *The Star of Hope,* Fed. Cas., No. 13,312 (1866), was a case of a voyage charter party to carry cargo from a port in Maine to Fort Gaines, Alabama. There was a delay in reporting at loading port, caused by excepted perils. The charterer repudiated the contract, but it was held that the charter party was not frustrated by the delay. No taking of the vessel was involved and the cargo in question was actually carried by the vessel, the parties agreeing to litigate the question of whether freight was payable at the rate of the original charter or the rate of a subsequent charter. The Court held that the original charter rate should be allowed, because the charter party had not been frustrated.

9. *Barker* v. *Hodgson* (1814), 3 Maule & S. 269, did not involve any taking of the vessel, but merely a prohibition of intercourse between the vessel and the shore at the loading port, because of pestilential disease.

10. *Ashmore* v. *Cox,* L. R. (1899), 1 Q. B. D. 436, involved a contract to sell hemp to be shipped from a port in the Philippines, by sailing vessel, between May 1st and July 31, 1898. There was a provision that if the goods did not arrive, from the loss of the vessel or other unavoidable cause, the contract was to be void. It was stated that owing to the Spanish-American War the shipment could not be made, but it does not appear in just what way shipment was prevented. A shipment was subsequently made by steamer on September 15th, and the shipment was declared under the contract, by the

sellers, on October 27th. The buyers refused to accept the declaration.

It was held that the declaration was defective; that a proper declaration was a condition precedent; that there was no implied condition of impossibility of performance and that the express exception only applied to goods shipped between May 1st and July 31st, and hence was inapplicable to the goods declared. The Court therefore gave the intended purchasers judgment against the sellers, for breach of contract.

The nature of the impossibility of performance in this case is not stated, but the case is clearly distinguishable from the instant case, because *no specific goods were involved,* and, as the Court intimates at page 442, if the sellers had declared hemp shipped between May 1st and July 31st, the sellers might have escaped liability.

Lord Russell said at page 442:

> "The ship was not, as it were, ear-marked. The seller might appropriate to the contract any shipment of proper quality, by sailer or sailers within the stipulated dates."

This being so, it cannot be said that the subject matter of the contract was destroyed. The trouble was that the only declaration of goods which was made was void.

11. *Carnegie Steel Company* v. *United States,* 240 U. S. 156 (1916), was a government contract for eighteen-inch steel plates, in manufacturing which the Steel Company met with unforeseen and very serious difficulties, owing to the fact that similar articles had apparently never been previously manufactured and the tests were

severe. The plates were, however, eventually supplied and the litigation involved the recovery of certain deductions made under the contract, for delay in their manufacture. A clause of the contract provided that delays which the Chief of Ordnance might determine to have been due to unavoidable causes, such as fires, storms, labor strikes, actions of the U. S., etc., should be excepted.

The Court gave judgment for the government, holding that the deductions were properly retained by it and that the delay under the rule of *ejusdem generis* was not covered by the exception.

The case did not involve any claim of frustration of contract. The contract was in fact carried out. It is therefore not in point.

12. *Richards & Company, Inc.* v. *Wreschner*, 174 N. Y. App. Div. 484 (1916), was a contract to deliver Belgian antimony at New York or Boston during the months of February to September, 1914. The only source of supply of this material was in Belgium. Antimony was supplied from February to July, but default was made during August and September, owing to the German invasion and an embargo by the German Government on its exportation. The Court held that non-performance was not excused.

Mr. Justice Weeks said at pages 486-487:

> * * * "It does not appear that the defendants could not have guarded against the very contingency which has arisen, by providing themselves with a sufficient supply of antimony to make deliveries during the last two months of the contract, by shipments from some port in Europe,

*nor does it appear that they could not have procured the antimony from a warehouse in some non-belligerent country of Europe * * *.*"

This case is clearly distinguishable from the instant case, because it was not a contract for specific antimony and it was not shown that other antimony was not available.

It is also distinguishable on the ground that the contract was not separable and that it was performed except as to the last two months.

13. *Cameron-Hawn Realty Company* v. *City of Albany*, 207 N. Y. 377 (1913), was a contract to pave a street in accordance with a city plan and keep it in repair for ten years, the city retaining five per cent. during the first two years as security for maintenance. The paving was done, but owing to the inappropriate nature of the paving as required by the city plan, the maintenance became a burden, and after two years the Realty Company claimed it was excused from its contract of maintenance.

The Court held that this was not the case.

There was no removal of the subject matter of the contract in this case; but the contract was merely not profitable and the case is therefore not in point.

14. *Kirk* v. *Gibbs*, 1 H. & N. 810; 26 L. J. Ex. 209, was a case where the owner of a vessel sued the charterer for not loading a full cargo. The charterer set up the fact that the Peruvian authorities only permitted this particular vessel to load the amount which was actually loaded. It was held that inasmuch as it was the char-

terer's duty to procure the permit and there was no allegation that the vessel was in an improper condition to load the full cargo, the owners were entitled to recover.

This was not a separable contract and was partially performed and rests on the ground of a breach of duty on the part of charterers.

15. *Beebe* v. *Johnson*, 19 Wend. 500 (1838), was a contract to perfect in England a patent, so as to insure the plaintiff the exclusive use in Canada. In later developed that the right was not given by England, but by the Canadian Government and only granted to the subjects of Great Britain or residents of the provinces, and hence could not be granted to the plaintiff.

It was held that this was not an excuse for non-performance and that the plaintiff was entitled to damages.

This is a case of a contract to do something which was impossible at the start and not a case of a contract which was perfectly possible when made, but was rendered impossible by a supervening act, which swept away the subject matter of the contract.

16. *Holyoke* v. *Depew*, Fed. Cas. 6652 (1868) was a voyage charter of a vessel to carry goods from the Canary Islands to New York. Upon arrival the authorities would not permit part of the cargo to be loaded, as the vessel came from an infected port.

It was held that inasmuch as the vessel was in fault in not being in proper condition to receive the cargo, in an action by the owner to recover freight on the goods actually carried, the charterer might set off damages

caused by the vessel's failure to load the other cargo up to the amount of the freight on the cargo actually carried.

This is not a taking of the subject matter of the contract in any manner, but a default of the vessel.

17. In *Jones* v. *Holm*, L. R. (1867) 2 Exch. 335, a vessel when partly loaded with cargo caught fire and was scuttled. The cargo which was on board and was damaged was sold at auction. The cargo which had not yet been loaded, was forwarded by another ship. The vessel was raised, repaired and tendered by the owners for the remainder of the cargo, two months after the date of the fire. The charterers repudiated the charter party.

The Court held that there was no frustration.

In reaching this result Baron Bramwell said:

> "The first objection made by the defendant was that in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the 'original voyage' was frustrated and the case is therefore within the rule which in the case of such frustration excuses the charterer from loading. *I do not, however, think that the facts stated have this effect. Nothing was said to show that the two months lost made the voyage a different voyage from that agreed for* * * *."

This is another case where on the facts the charter party was held not to be frustrated by the delay in that particular case. It is submitted that this case is, however, quite different from the instant case. The delay

was not of indefinite extent, but could be calculated in advance and was within the full knowledge of the parties.

18. *Hasler* v. *West India Steamship Company,* 214 Fed. 862 (1914), turns on the question of equitable estoppel and right of cancellation, and has no relation to frustration.

19. *Hurst* v. *Usborn* (1856), 18 C. B. 141, is another case of delay in arriving at loading port, which involved no destruction of the subject matter of the contract. The ship reported within the terms of the charter and found the charterer in breach of his obligation because he was without ready cargo. This is quite different from the instant case.

20. *The Assicurazioni Generali & Schencker & Co.* v. *Steamship Bessie Morris Co., Ltd.* (1892), 7 Asp. Mar. Cas., 217, was the case of a vessel chartered to carry from Adriatic ports to London. She loaded and sailed, but became disabled by stranding in the course of her voyage. The vessel was seriously injured and the shipowner refused to continue his voyage, but in an action by the charterer it was held that since the vessel was commercially capable of being repaired and proceeding with the voyage within a reasonable time, the shipowner was liable for non-performance and did not have a right to abandon the voyage.

The vessel was at all times within the control of the parties and whether she could be repaired and returned to service within a reasonable time could be ascertained

by them. On this ground the case is clearly distinguishable from the instant case.

21. The following cases turn upon the consideration of the particular contract in question:

United States v. *Gleason*, 175 U. S. 588;
Chicago, Milwaukee, etc. Railway v. *Moore*, 240 U. S. 165.

22. *Atkinson* v. *Ritchie* (1809), 10 East 530, involved a voyage charter to carry goods from St. Petersburg to England. When only partly loaded the Master sailed in consequence of a rumor that an embargo was about to be placed on all English ships. The Master was held liable to the charterer for not loading a full cargo.

There was no actual seizure of the vessel in this case and the Master acted improperly. It is therefore different from the instant case.

23. In *Ye-Seng Company* v. *Corbitt*, 9 Fed. 423, a vessel was chartered to carry passengers from Hongkong to Portland. Upon arrival the port authorities, owing to her condition, would not permit her to load passengers. The charterer sued the owner on the contract and recovery was allowed on the ground that the contract had been breached because the vessel was not safe to carry passengers.

This case merely holds that an owner cannot tender an unfit vessel which the port authorities will not permit to perform their contract and then, having created the difficulty through his own fault, claim that the contract has been frustrated by the port authorities.

24. *Columbus Railway Power & Light Co.* v. *City of Columbus,* 249 U. S. 399 (1919). The city, by an ordinance which was accepted by the Street Railway Company, had a contract binding the railway to furnish street railway service for twenty-five years, at a specified rate, in return for the use of the streets. During the period the contract became unprofitable to the Street Railway Company, owing to the increase of wages allowed employees by the War Labor Board. It was held that the Railway Company must still perform its contract.

Mr. Justice Day, who delivered the opinion of the Court, says, at page 410:

> "There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. * * * There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance."

On these grounds the case is clearly distinguishable.

This case was decided April 14, 1919. At page 413 the Court discusses the case of *Metropolitan Water Board* v. *Dick Kerr & Company, Ltd.,* (1918) A. C. 119, distinguishes it from the case which was then before the

Court, on the ground that the interruption in the *Metropolitan* case was of such character and duration as to make the contract when resumed a different contract from the contract when broken off, and also on the ground that the *Metropolitan* case involved a direct intervention of the power of the government.

25. *The Sun Printing and Publishing Association* v. *Moore*, 183 U. S. 642 (1901), was an action by the owners against the charterers of a yacht used for dispatch purposes during the Spanish-American War. The vessel was lost in the course of the employment and the Court held that under the various contracts existing between the parties the charterer had agreed to pay the value stated in one of the contracts, in case the vessel should be lost.

This was not a case where a charterer was suing because an owner did not tender a vessel under a charter, and the principle of frustration was not involved therein.

26. *Berg* v. *Erickson*, 234 Fed. 817 (1916), was a contract to furnish to one thousand cattle "plenty of good grass, salt and water," during the grazing season of 1913, at a certain rate per head. By a drought which amounted to "an act of God," full performance became impossible from July to October, but the performance contracted for was good during May and June and sufficient grass was given during the remainder of the season to keep the cattle alive and maintain their weight.

The Court held that damages were due for the failure to perform fully from July to October.

In the course of his opinion Mr. Justice Sanborn mentions that there were authorities to the effect that where performance of a contract becomes impossible through the destruction of the subject matter, without fault of either party, the contract is frustrated. But he indicates that inasmuch as no decision of the Supreme Court nor of any Federal court to that effect had been cited or discovered, he felt bound to adopt a contrary rule.

It is submitted that the case of *The Allanwilde* and other cases in the Circuit Courts of Appeal and District Courts, cited by the appellees, sufficiently show that this is not the case at present.

Berg v. *Erickson* is distinguishable, however, on the ground that the contract was performed in full for a part of the time and partially for the balance of the time.

27. *Hadley* v. *Clarke*, 8 Term. Rep. 259 (1799) shows the common law strictness. In that case the vessel was chartered to carry from Liverpool to Leghorn. While she was awaiting convoy at Falmouth, the Privy Council laid an embargo on all vessels proceeding to Leghorn July 27, 1796. The embargo was not raised until October 24, 1798. In August, 1798, the vessel returned to Liverpool and discharged her cargo, which the shipper received without prejudice and upon the lifting of the embargo sued the shipowner for breach of contract to carry.

The Court reluctantly allowed a recovery, on the ground that "a temporary interruption of a voyage by an embargo does not put an end to such a contract as this."

It is submitted that this case and *Spence* v. *Chodwick*, 10 Q. B. 517, also cited by the petitioner, *do not represent the present state of the English law as to frustration of charter parties.*

The Court is referred in this connection to the cases of *Lloyd Royal Belge* v. *Stathatos*, 33 T. L. R. 390, 34 T. L. R. 70, cited in the respondents' brief, and also to Scrutton on *Charter Parties and Bills of Lading*, eleventh Edition, pages 95 to 103, and the brochure of Mr. F. D. Mackinnon on "*The Effect of War on Contracts.*"